Supreme Court, U. S.
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APPENDIX

In The Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-678

SHELL OIL COMPANY,
Petitioner

V.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 15, 1976
CERTIORARI GRANTED FEBRUARY 22, 1977

IN THE
SUPREME COURT OF THE UNITED STATES
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5/21/74	Pf Dartt's original Complaint filed in U.S. District Court for Northern District of Oklahoma.
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8/22/74	Further hearing on Df.'s Motion to Dismiss.
2/6/75	Order entered dismissing Complaint for lack of subject matter jurisdiction.
3/5/75	Notice of appeal filed by Pf.
4/18/75	Appeal docketed in Tenth Circuit Court of Appeals.
8/4/75	Brief of Dept. of Labor as *amicus curiae* filed
8/5/75	Motion by Shell Oil Co. to strike brief of *amicus curiae*, or for leave to file response.
8/15/75	Order granting Shell Oil Co. leave to respond to brief of *amicus curiae*.
7/22/76	Decision by Tenth Circuit reversing decision of District Court and remanding cause for trial.
8/19/76	Order denying Petition of Shell Oil Company for rehearing; order denying suggestion for rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NO. 74-C-221

ANNE M. DARTT,
Plaintiff,

v.

SHELL OIL COMPANY,
Defendant.

Attorney's Lien Claimed

Filed May 21, 1974

COMPLAINT

I

This action arises under the provisions of Section 7(b) of the Age Discrimination in Employment Act (ADEA) (29 U.S.C., Sec. 626(b) and Sec. 16(b) of the Fair Labor Standards Act (F.L.S.A.) (29 U.S.C., Sec. 216 (b). The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. Jurisdiction of this Section is conferred on this court by said Sec. 7(b) of the ADEA (29 U.S.C., Sec. 626(b) and by Title 28 USC, Sections 1331 and 1332.

II

Plaintiff herein is a resident of the City of Tulsa, State of Oklahoma. Plaintiff is 52 years of age.

III

The defendant, Shell Oil Company, is a foreign corporation, incorporated under the Laws of the State of Delaware. They are licensed to do business within the State of Oklahoma, and they own and operate a Credit Card Center located in Tulsa, Oklahoma, where plaintiff

was previously employed by them. The acts and occurrences upon which plaintiff bases her cause of action occurred within the jurisdiction of this court.

IV

Plaintiff alleges that at all material times hereinafter mentioned, defendant employed its employees at its said Credit Card Center in transporting, selling, handling or otherwise working on goods that have been moved in or produced for commerce, as defined in Section 11(g) of the ADEA (29 U.S.C., Sec. 630(g)). Defendant has other facilities located throughout the United States which they operate and which are all similarly engaged in Interstate Commerce. Said defendant was, and is, therefore, engaged in commerce within the meaning of the ADEA, and was, and is, engaged in an industry affecting commerce as defined in Section 11(h), of said Act (29 U.S.C., Sec. 630(h)).

V

During the period since July 2, 1964, defendant has been engaged in an industry affecting commerce, as aforesaid, and has employed at its said Credit Card Center twenty-five (25) or more employees for each working day in each of twenty (20) or more calendar weeks in the preceding calendar year. Said defendant was, and is, therefore an employer within the meaning of Section 11(b) of the ADEA (29 U.S.C., Sec. 630(b)).

VI

Plaintiff is an adult woman, 52 years of age, and brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on her own behalf and on behalf of all other persons between the ages of 40 and 65 years, who are employed by the Shell Oil Company, and who are similarly situated and who are subjected to and affected by the discriminatory and unlawful employment practices committed by respondent company.

VII

Furthermore, plaintiff brings this action on her own behalf and on behalf of all other persons who are either presently employed by Shell Oil Company and are between the ages of 40 and 65 years, or who have been discharged by the defendant, Shell Oil Company, within the preceding 180 days, and on behalf of all persons between the age of 40 and 65 years who have applied or will apply for employment at respondent company.

VIII

As to each class of persons described above, the class is so numerous, the joinder of all members is impracticable. There are questions of law and fact common to the class, the claims of the plaintiff will fairly and adequately protect the interests of the class and respondents have acted, or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

IX

Plaintiff was employed by the defendant from January 3, 1966, to July 31, 1973, during which time she progressed to the position of senior analyst. That on April 16, 1973, the plaintiff was transferred by the defendant to a new and different department on a special assignment. That upon completion of the special assignment, she was informed by the defendant that she would not be able to return to her customary work. Plaintiff alleges that later on July 31, 1973, the defendants informed her that they had reorganized the credit department, wherein she had previously been working and that all the positions were filled, and that they had nothing for her, so they were forced to terminate her. That the defendant did, in fact, terminate plaintiff on July 31, 1973. Plaintiff alleges that she was terminated solely because of her age.

X

Plaintiff alleges that the defendant did, during the time that she was employed by the defendant and prior to her termination, discriminate against her in employment on the basis of age, in that:

1. Defendant refused to promote plaintiff on a merit basis, but instead promoted younger employees of inferior ability over her;

2. Defendant arbitrarily adopted a no promotion policy for older employees between the ages of 40 and 65 years;

3. Defendant arbitrarily adopted a policy of discharging and easing out older employees to make room for younger employees;

4. Defendant employed a subjective, unfair, and unlawful testing procedure to effectuate their policy of age discrimination in employment;

5. Defendant discharged plaintiff solely on the basis of her age;

XI

Plaintiff alleges that prior to filing the instant action, plaintiff notified the Secretary of Labor in writing of her intent to do so, and, as plaintiff is informed and believes, the Secretary of Labor informed the defendant of his receipt of said notification and attempted, but failed, to effect voluntary compliance with the requirements of the ADEA on the part of the defendant through conciliation, conference and persuasion. More than 60 days have elapsed since said notice was sent by plaintiff to the Secretary of Labor as aforesaid. A copy of said notice is attached hereto as Exhibit "A".

XII

As a result of defendant's willful discharge of the

plaintiff, and as a result of defendant's willful discrimination against plaintiff during the period of her employment solely on the basis of age, all in willful violation of the ADEA, as aforesaid, and contrary to the provisions of Section 16 of the Fair Labor Standards Act (29 U.S.C., Sec. 216), there is due and owing to plaintiff the sum of $50,000.00 in unpaid minimum wage and overtime compensation.

WHEREFORE, plaintiff prays as follows:

1. That this court issue a mandatory injunction directing the defendant to employ plaintiff in the position of Supervisor or other position commensurate with her experience and ability, or in lieu thereof to require the defendant to pay plaintiff wages commensurate with the position to which she is entitled commonly known as "front pay."

2. That this court award plaintiff the sum of $50,000.00 as unpaid minimum wage and overtime compensation, plus a like sum of liquidated damages for the loss of wages she has sustained to this date, together with the additional sum of $50.00 for each day that elapses until plaintiff is employed by defendant.

3. That this court award plaintiff a reasonable attorney's fee and the costs of this action, together with liquidated damages provided by law.

4. That this court grant plaintiff such other, further, legal and equitable relief to which this plaintiff may be entitled.

GREER AND GREER

BY_____

Jefferson G. Greer
206 Beacon Bldg.
Tulsa, Oklahoma 74103
(918) 584-3591
Attorneys for plaintiff

March 14, 1974

Department of Labor
Room 3014
Page Belcher Federal Bldg.
U.S. Post Office & Courthouse
Tulsa, Oklahoma 74103

Attention: Mr. J. Dean Speer
Assistant Area Director

Re: Mrs. Anne Dartt
8716 E. 30th Street
Tulsa, Oklahoma 74129

Gentlemen:

This letter will serve as our notice that Mrs. Anne Dartt will file a civil action against her former employer, Shell Oil Company, because of their having violated the age discrimination in employment act. As you know, Mrs. Dartt has previously filed a complaint with your office and I understand that you are in the process of making an investigation into the complaint. Mrs. Dartt will file her action in the United States District Court in Tulsa, Oklahoma, at the expiration of the 60 days notice required by Statute.

REQUEST FOR INFORMATION

We respectfully request that you make available to this claimant any and all information which your investigation has or will disclose, all as permitted by law and specifically the Freedom of Information Act. We would appreciate any assistance you can give us in processing this claim.

We will look forward to hearing from you at your earliest convenience.

Very truly yours,
GREER AND GREER
By
Jefferson G. Greer

JGG:lr

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

[Title omitted in printing.]

Filed June 11, 1974

**MOTION TO DISMISS
FOR FAILURE TO STATE
A CAUSE OF ACTION**

Comes Now Shell Oil Company, Defendant herein, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves the Court to dismiss this action for failure to state a cause of action, for the following reasons, to-wit:

1) Plaintiff alleges that she was discharged on July 31, 1973, but that she did not file a notice of intent to sue with the Department of Labor until March 14, 1974.

2) Plaintiff further alleges that all discrimination against her occurred no later than July 31, 1973.

3) Plaintiff brings this action pursuant to 29 U.S.C. Sec. 626, which provides in pertinent part that:

> d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice *shall be filed —*
>
> > *1) within one hundred and eighty days after the alleged unlawful employment practice occurred.* (Emphasis supplied)

4.) By her own pleadings, the last day on which the Defendant allegedly discriminated against Plaintiff

was July 31, 1973. One hundred and eighty days from that date is January 27, 1974. Plaintiff alleges that her notice was not filed until March 14, 1974.

5) Plaintiff's notice was untimely filed with the Department of Labor. The timely filing of such notice being a jurisdictional prerequisite to the bringing of a suit, Plaintiff has failed to state a cause of action upon which relief may be granted.

6) Moreover, even assuming that the notice was timely filed, Plaintiff did not file her notice with the Secretary of Labor, as is required by the statute. (See Exhibit A to the Complaint.) Her notice being defective, Plaintiff has not met the jurisdictional prerequisite to the bringing of suit, and, therefore, has failed to state a cause of action upon which relief may be granted.

WHEREFORE, Defendant respectfully prays that this action be dismissed, with costs taxed against the Plaintiff.

DATED this 6th day of June, 1974.

KOTHE AND EAGLETON, INC.

/s/ Mary T. Matthies

Mary T. Matthies
C. A. Kothe
124 East Fourth Street
Tulsa, Oklahoma

Attorneys for Defendant,
Shell Oil Company

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Case No. 74-C-221

ANNE M. DARTT,
Plaintiff,
-vs-
SHELL OIL COMPANY,
Defendant.

Filed Feb. 6, 1975

ORDER

This case involves the construction and application of Section 7(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §626(d). Plaintiff is a former employee of Defendant. She alleges that she was discharged by Defendant solely because of her age. Section 4(a) of the ADEA, 29 U.S.C. §623(a), makes it unlawful for an employer who is covered by the Act to discharge any individual because of the individual's age. The ADEA has application to individuals who are at least forty years of age but less than sixty-five years of age, 29 U.S.C. §631. Plaintiff states she was fifty-one years of age when discharged.

Defendant has filed herein a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. It is Defendant's position that this Court lacks subject matter jurisdiction to hear this case. Although lack of subject matter jurisdiction is normally attacked through a Motion to Dismiss for lack of subject matter jurisdiction made pursuant to Rule 12(b)(1), Federal Rules

of Civil Procedure, Defendant's Motion is proper herein as Defendant attacks a defect which appears on the face of Plaintiff's Complaint. It is Defendant's position that the Complaint shows Plaintiff failed to file timely notice of an intent to sue with the Secretary of Labor as required by 29 U.S.C. §626(d). This defect, apparent on the face of the Complaint, is an affirmative defense. Affirmative defenses which appear on the face of a Complaint may be asserted by a Motion to Dismiss for failure to state a claim upon which relief can be granted. 5 Federal Practice and Procedure, Civil, Wright and Miller, §1357.

Defendant has raised a substantial jurisdictional question through its Motion to Dismiss. The Court has, pursuant to the direction of *Schramm* v. *Oakes*, 352 F. 2d 143 (Tenth Cir. 1965), held evidentiary hearings to more fully develop the facts necessary to determine the jurisdictional challenge. The pertinent facts of this case as derived from the well pleaded allegations of the Complaint and two evidentiary hearings are found to be as follows:

Plaintiff was employed by Defendant from January 3, 1966 until July 31, 1973. She was terminated at the latter date. At the date of termination Plaintiff was fifty-one years of age. During the period of Plaintiff's employment, since and after 1967, Defendant maintained posted notices informing employees of the ADEA in conspicuous places throughout the places where Defendant was employed.[1] Though Defendant testified she did not see these notices, a reasonably alert employee in the same or similar circumstances as Plaintiff would have seen them. On September 9, 1974, shortly after her termination, Plaintiff contacted Mr. J. D. Speer, an Assistant Area Director of the Department of Labor in the Tulsa, Oklahoma area.

[1] These notices are required by 29 U.S.C. §627.

At this time she complained that she had been fired because of her age. Mr. Speer did not inform Plaintiff that she had a right to maintain a civil action on her own behalf under the ADEA. He stated that he would investigate the complaint. Subsequently, Plaintiff attempted to contact Mr. Speer several times by telephone. In each instance she was informed she would be notified as soon as any action was taken on her complaint. On March 5, 1974 Speer wrote Plaintiff a letter in which he stated there would be a delay in investigating her complaint. In this letter he also informed Plaintiff she had the right to bring a civil action on the basis of her complaint. He enclosed a Department of Labor Pamphlet containing basic information concerning the ADEA. This was the first date on which Plaintiff claims she had actual knowledge of her right to maintain civil action under the ADEA. Thereafter Plaintiff contacted an attorney who, on March 14, 1974, mailed a letter to the Department of Labor addressed to the local office at Tulsa, Oklahoma, for the attention of Mr. Speer, informing the Department that the Plaintiff intended to commence a civil action against the Defendant based on alleged ADEA violations.

29 U.S.C. §626(d) reads in part as follows:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, . . ."

It is Defendant's position that the face of the Complaint reveals Plaintiff did not file notice of intent to file a civil action within one hundred and eighty days of the alleged discriminatory act and that when notice was filed it was not with the Secretary as is required by the Section,

but was with a local Assistant Area Director. It is Plaintiff's position that the 180 day filing period is directory and not jurisdictional. She further contends she gave adequate notice by informing the Department of the alleged discriminatory act on her initial visit with Mr. Speer. She further contends the filing period should be tolled in this case because the Department failed to inform her of her right to bring a civil action under the ADEA. (To this same end she contends Defendant failed to perform its statutory duty of posting notice informing employees of the ADEA as is required by 29 U.S.C. §627 but the Court resolves this factual issue against Plaintiff as heretofore set out.)

With regard to Plaintiff's contention that the filing of a notice of an intent to sue with the Secretary within 180 days of an alleged discriminatory act is not a jurisdictional prerequisite to the right to maintain a civil action under the ADEA, the Court concludes Plaintiff's position is neither supported by authority nor reason.[2] Literally

[2] Plaintiff relies on *Goger* v. *H. K. Porter Company, Inc.*, 492 F. 2d 13 (Third Cir. 1974) to support her contention that filing notice of intent within the statutory period is not a jurisdictional prerequisite to the right to maintain a civil action. *Goger* deals with 29 U.S.C. §626(d)(2). This section sets the time limits within which notice of intent to sue must be filed in cases falling under Section 14(b) of the ADEA, 29 U.S.C. §633(b). Section 14(b) basically provides that if a state has an agency with authority to deal with age discrimination in employment the state remedy must be attempted before a civil action under 29 U.S.C. §626(d) may be commenced. In *Goger* the plaintiff failed to avail himself of available state remedy. Instead he proceeded directly through the Department of Labor. The time limits within which the plaintiff could have commenced an action under the state law expired. The district court dismissed the action holding that the ADEA required the plaintiff to exhaust available state remedies prior to commencing a civil action. On appeal the Third Circuit held:

> "While we do not consider the failure to file a timely complaint

Continued on p. 14

every reported case which has dealt with the question has held the filing period to be jurisdictional. *Powell* v. *Southwestern Bell Telephone Company*, 494 F. 2d 485 (Fifth Cir. 1974); *Oshiro* v. *Pan American World Airways, Inc.*, 378 F. Supp. 80 (D. Hawaii 1974); *Cochran* v. *Ortho Pharmaceutical Company*, 376 F. Supp. 302 (E.D. La. 1971); *Burgett* v. *Cudahy Company*, 361 F. Supp. 617 (D. Kan. 1973); *Bunch* v. *Barnett*, 62 FRD 615 (D. S.Dak. 1974); *Gebhard* v. *GAF Corporation*, 59 FRD 504 (D.C. D.C. 1973). Also, the intent of Congress is clearly expressed in the statute. Notice of an intent to sue *shall* be filed within one hundred and eighty days of an alleged discriminatory act. Where the language of a statute is

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Footnote 2 Continued from p. 13

with the appropriate state agency a mere 'technical' omission, we nonetheless consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing section 633(b) during the period involved here and in view of the remedial purposes of the 1967 Act. In the future, however, we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced . . ."

Plaintiff's reading of the case is incorrect. In *Goger* the court granted equitable relief under the circumstances of the case since there were no cases construing the point raised by that plaintiff on appeal. The court did hold that resort to available state remedies was a jurisdictional prerequisite to the maintenance of a civil action based on the ADEA. And the court clearly stated that in the future, now that there was a decision on point, the Congressional intent should be strictly enforced and followed. This case does not by analogy support Plaintiff's position. Indeed, it undermines her position. There are many cases holding that, in situations to which §626(d)(1) applies, filing notice of an intent to sue within 180 days of the alleged discriminatory act is a jurisdictional prerequisite to the maintenance of a civil action. Thus, Plaintiff cannot avail herself of the special circumstances of *Goger*. In fact *Goger* must, in this case, be read to support the proposition that the clear intent of Congress should be applied and enforced.

plain and unambiguous it must be given effect according to its plain and obvious meaning. 82 CJS Statutes §322(2). Thus it is the decision of this Court that filing notice of an intent to sue with the Secretary within 180 days of an act of age discrimination is a jurisdictional prerequisite to the right to maintain a civil action under 29 U.S.C. §626(d)(1).

Plaintiff's second contention is that her act of informing the Department of Labor that she had been fired because of her age constitutes sufficient notice of an intention to sue to either satisfy 29 U.S.C. §626(d)'s notice requirement or to toll the running of the 180 day notice period. This argument is supported by some authority but not by reason. Plaintiff relies on *Woodford* v. *Kinney Shoe Corporation*, 369 F. Supp. 911 (N.D. Ga. 1973). The facts of *Woodford* are very similar to the facts herein. In *Woodford* the plaintiff contacted the Department one hundred and sixty days after she was fired and stated that she had been discriminated against. Apparently she did not state she intended to sue, however, the facts on this point are not specific. The court held:

> ". . . where an employee, within one hundred and eighty days of his discharge, reports to the Labor Department that he has been discharged from his job because his employer discriminates against older workers, the employee's right to file suit later under the Age Discrimination Act is preserved, even if the employee does not in so many words declare to the Department his intent to file such an action."

This decision disregards the clear mandate of 29 U.S.C. §626(d) that:

> "No civil action may be commenced by any individual under this section until the individual has given

the Secretary not less than sixty days' *notice of an intent to file such action . . .*" (Emphasis added.)

It is difficult to equate a complaint of age discrimination made to a local wage and hour office with a notice of intent to bring a civil action filed with the Secretary of Labor. The language of Section 626 could not be clearer as to what is required. To hold that a complaint of age discrimination is a notice of intent to sue is in effect to rewrite a portion of a Federal statute. This is beyond the power of the Court.

The ADEA is enforced according to the powers, remedies and procedures provided by 29 U.S.C. §211(b), 216(b)-(d) and 217. Under 29 U.S.C. §216(c) the Secretary of Labor is authorized to sue on behalf of employees where there is a violation of the Act. Under 29 U.S.C. §216(b) the right of an employee to bring a civil action, in certain circumstances is terminated, when the Secretary commences an action. Thus, when the Secretary of Labor commences an investigation upon the basis of a complaint filed by an employee that he has been discriminated against, the employer does not necessarily have notice that the aggrieved employee intends to sue. In *Powell* v. *Southwestern Bell Telephone Company, supra,* the court stated:

> ". . . It is logical that the 180 day notice was intended to insure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination since the notice goes from the Secretary of Labor on to the employer involved."

The Secretary has the power to make investigations under the ADEA, 29 U.S.C. §626(a). In the case at hand Plaintiff filed her complaint with the local wage and hour division. It in turn promised to commence an investigation and did

in fact do so. The investigatory powers of the ADEA are in accordance with the powers and procedures provided by 29 U.S.C. §§209 and 211. It does not appear that under the provisions of these statutes the commencement of an investigation by the Department of Labor would effectively notify an employer that an employee intended to bring a civil action under the ADEA. Thus to hold that the mere filing of a complaint with the Department satisfies the notice requirement of 29 U.S.C. §626(d) thwarts one of the basic purposes of that section that a potential defendant become aware of its status and the possibility of litigation reasonably soon after the alleged discrimination. In fact, as is evidenced by the facts of this case, there is no guarantee that the Labor Department investigation commenced pursuant to a discrimination complaint would even begin within a reasonably short time after the filing of a complaint. The employer would therefore not even have reason to suspect that there was some complaint against it until well after the alleged act of discrimination. This is clearly contrary to the intent of Congress.

It is apparent from the history of the ADEA that Congress was concerned with notice to an employer within a reasonable time after an alleged act of discrimination. In *Powell* v. *Southwestern Bell Telephone Company, supra,* the court noted:

> "Perhaps the most interesting feature of the origin of the 180 day notice limitation is that it appeared in the original bill as introduced in the Senate, was deleted from the House passed bill, and was restored by the amendment in the Senate when the House bill was returned for consideration by the upper chamber. The House concurred in the amendment. Its restoration, together with that of several other portions of the original Senate bill, was 'intended to answer some

> of the disquiet in American business . . . keeping also in mind the practical problems of administration . . .' 113 Cong. Rec. 35056 (Remarks of Senator Javits)."

It is obvious from this history that Congress attached significant importance to the 180 day notice requirement. It cannot be said that the mere filing of a complaint of discrimination with the Department of Labor fulfills the same function as required notice of an intent to sue.

The final clause of 29 U.S.C. §626(d) reads as follows:

> "Upon receiving notice of an intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."

The filing of notice of intent to sue performs two functions. The prospective defendant is promptly notified of the possibility of litigation. And the Secretary is induced to promptly begin informal methods of conciliation, knowing that a civil action will proceed if he does not obtain results. It cannot be said that these functions are performed by the mere filing of a complaint of age discrimination with a local office of the Department of Labor. It does not appear that in the enforcement provisions of the ADEA applicable to the Secretary that there is any requirement of promptly notifying an employer that a complaint has been filed against it. Nor does it appear that there is any requirement that the Secretary promptly act on a complaint. Therefore, the mere registration of a complaint of age discrimination with the local wage and hour division of the Department of Labor cannot be held by this Court to satisfy the notice requirement of 29 U.S.C. §626(d).

Plaintiff's final argument is that the 180 day notice period was tolled when she filed her complaint with the Department and it failed to notify her of her right to sue until after the 180 day notice period had expired. Defendant argues that Plaintiff's mere ignorance of her legal rights does not toll the running of the notice period. It is axiomatic that a person's ignorance of his legal rights will not toll the running of a statute of limitations. 54 CJS, Limitations of Actions, §205. Although a traditional statute of limitations is not involved herein, the same principle should apply. All persons are charged with knowledge of the provisions of statutes. 58 AmJur 2d, Notice, §21. Therefore, Plaintiff must be charged with notice of the provisions of 29 U.S.C. §626(d). Also, as has been previously found herein, Defendant maintained, throughout the period of Plaintiff's employment, posted notices regarding the ADEA. These notices were conspicuously posted as is required by 29 U.S.C. §627. Although Plaintiff testified that she never saw the notices, her testimony is unbelievable. It must be concluded that a reasonably aware person in the same or similar circumstances would have seen the notices. Thus, Plaintiff had not only presumptive notice of the content of the ADEA but she also must be charged with constructive knowledge from the posted notices which would lead a reasonable person to know or to inquire into his legal rights under the ADEA.

Defendant also argues, convincingly, that the mere filing of a complaint with the Department of Labor by Plaintiff did not toll the notice period since such action is permissive and not mandatory. The use of a permissive administrative remedy does not toll running of a statute of limitations. *Steel Improvement & Forge Company* v. *United States*, 355 F. 2d 627 (Ct. Cl. 1966); *O'Callahan* v. *United States*, 451 F. 2d 1390 (Ct. Cl. 1971). Recourse

to the Department of Labor is not mandatory under the ADEA except to give the required notice of intent to sue. An aggrieved employee does not have to file a complaint with the Department. An employee who wants to file his own civil action only has to notify the Department that he intends to bring such an action. There is a mandatory sixty day waiting period in which the Secretary is supposed to mediate, but this alone does not appear to make the administrative remedy mandatory. Further, the aggrieved party is not bound by the result of any settlement achieved by the Secretary in such mediation. If not satisfied the employee may sue if the required notice of intent to sue is accomplished.

It is a well settled general rule that in a given situation a statute of limitations will be tolled if the Congressional purpose which motivated the involved legislation will thereby be effectuated. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 88 L. Ed. 96, 64 S Ct 128 (1943); *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424, 13 L Ed 2d 941, 85 S Ct 1050 (1965); *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 38 L Ed 2d 713, 94 S Ct 756 (1974). In *Burnett* the Court stated:

> ". . . the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.
>
> In order to determine congressional intent, we must examine the purpose and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."

The Congressional purposes underlying the limitations period provided by 29 U.S.C. §626(d) have been previously considered. That policy as discussed in *Powell* v. *South-*

western Bell Telephone Company, supra, was to make potential defendants aware of their status and the possibility of litigation reasonably soon after the alleged discrimination. This would promote the good faith negotiation of employers during the 60 day conciliation period provided by 29 U.S.C. §626(d). It also provides the opportunity for preservation of evidence and records for use at a trial necessitated by a failure of negotiation. It has been seen from the history of the ADEA that Congress considered the notice provisions to be important. The policies underlying the ADEA are set out in the first section of the Act, 29 U.S.C. §621. That section reads in part, as follows:

> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

The remedial scheme of the Act is basically two fold. An individual employee may enforce the rights created by the Act through an individual action or the Secretary may bring an action on behalf of employees. The Act encourages settlement of differences through the use of state remedies or conciliation through the offices of the Secretary.

In considering the factors delineated in *Burnett*, it is the conclusion of this Court that the purposes of the Act will not be best effectuated through tolling the limitations period herein. Plaintiff relies heavily on *Burnett*. In that case the plaintiff commenced an action under the Federal Employer's Liability Act (FELA) in a state court of competent jurisdiction. The action was dismissed due to venue provisions of the Ohio law. Plaintiff promptly refiled in a Federal District Court of competent jurisdiction. However,

between the time of commencing the state action and the Federal action, the statute of limitations provided by the Act had expired. The District Court dismissed the action on the grounds that the statute of limitations had run. The Circuit Court of Appeals affirmed. The Supreme Court reversed.

The Supreme Court held that statutes of limitations are designed to promote fairness to defendants. Such statutes promote justice by preventing surprises through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The Court noted that in the case before it the petitioner did not sleep on his rights but filed a timely action in a court of competent jurisdiction. Service of process was had on the defendant notifying it that the petitioner was asserting his rights by suit. Venue was improper under Ohio law but the defendant could have waived venue. The court held that the defendant could not rely on the policy of repose since it was aware that the plaintiff was asserting its rights by suit. Thus, the Court held that the statute of limitations was tolled by the filing of the state court action.

Congress has written into the ADEA an 180 day notice requirement designed to give potential defendants prompt awareness of their status. The traditional policy reason behind a statute of limitations mentioned in Burnett, the promotion of justice by preventing surprise through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, may not have full effect in such a short period of time. Congress nevertheless deemed quick notice to potential defendants to be essential to its new statutory scheme to alleviate the problems of age discrimination in employment. If in creating a new right

Congress deems speedy notice essential, as it obviously did in the case of the ADEA, the courts ought not to avoid the notice requirement for any less compelling reason than would justify the tolling of a statute of limitations. The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no such comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case

Plaintiff suggests that the policy of the ADEA is humanitarian and remedial, hence timely notice should be waived in this case. It is also the policy of the Act to give potential employers prompt notice of their status as potential defendants. In this context where Plaintiff did not take any action which would justify the tolling of a statute of limitations in a parallel situation, the above policies of the Act are evently balanced and one does not outweigh the other. In such situation the intent of Congress should be fully applied. Plaintiff was not prevented from asserting her rights by the failure of an employee of the Department of Labor to inform her of them. There is no such duty imposed by the ADEA, nor is one mentioned in the relevant CFR. Plaintiff is assumed to know the law and was possessed of more than enough information to put a reasonable person on inquiry. In this case there are no facts which justify the tolling of the 180 day limitations period. This is not to say that Plaintiff's rights are completely lost. There appears to be yet a possibility that the Department of Labor will undertake and obtain successful action on her part. Her dependence on these Departmental efforts appears to be just in this case as she elected to put her case in its hands and rely on it and not inquire into and pursue her own rights.

Plaintiff contends that she should be allowed to maintain this action as a class action under the "private attorney general" doctrine even if she is found not to have standing to sue on her own behalf. It is her position that she can maintain this action on behalf of similarly situated employees of Defendant even if she is precluded from recovery. Plaintiff relies on *Jenkins* v. *United Gas Corporation*, 400 F. 2d 28 (Fifth Cir. 1968); *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711 (Seventh Cir. 1969); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (Eighth Cir. 1970) and *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (Fifth Cir. 1970) in support of this proposition. Each of these cases appears to be distinguishable from the case at hand in that the involved plaintiffs had, at least initially, standing to sue. Herein Plaintiff does not even have initial standing to sue.

Moreover, in *O'Shea* v. *Littleton*, 414 U.S. 488, 38 L. Ed. 2d 674, 94 S Ct 669 (1974) the Court stated:

> ". . . if none of the named Plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class . . . "

Article 3 §2 of the Constitution requires that the judicial power of the United States may not be exercised unless there is an actual case of controversy before it. In order for there to be a case or controversy a plaintiff must have a personal stake in the outcome of a controversy. *Baker* v. *Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S Ct 691 (1962); *O'Shea* v. *Littleton, supra*. It has been previously determined that Plaintiff herein has no standing to sue. She could not gain any recovery through the prosecution of a class action against Defendant. She has failed to satisfy a jurisdictional prerequisite to recovery on her own

behalf. Therefore, she does not have a personal stake in the outcome of a class action based on alleged policies of age discrimination perpetrated by Defendant. Thus, Plaintiff does not have a case or controversy with Defendant and cannot bring a class action on behalf of others.

Accordingly, Defendant's Motion to Dismiss should be sustained and Plaintiff's action dismissed for lack of subject matter jurisdiction in this Court.

It is so ordered this 6th day of February, 1975.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1277
(74-C-221)

ANNE M. DARTT,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

Filed July 22, 1976

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jefferson G. Greer of Greer and Greer on the brief for Appellant.

Mary T. Matthies of Kothe, Nichols & Wolfe, for Appellee.

Jacob I. Karro (William J. Kilberg, Solicitor of Labor; Carin Ann Clauss, Associate Solicitor; Sylvia S. Ellison, Paul D. Brenner; and Ronald M. Gaswirth, Regional Solicitor, of counsel, on the brief) for The Secretary of Labor as Amicus Curiae.

Before LEWIS, Chief Judge; BREITENSTEIN and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

Mrs. Anne M. Dartt sued the defendant Shell Oil Company alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Fair Labor Standards Act (FLSA), 29

U.S.C. §§ 201 *et seq.* The trial court dismissed Dartt's action for lack of subject matter jurisdiction because of Dartt's failure to file her notice of intent to sue within the 180-day period as required under 29 U.S.C.S. § 626(d)(1).[1]

Dart had been employed at Shell's Credit Card Center in Tulsa, Oklahoma, from January 3, 1966, to July 31, 1973, at which time she was discharged. Ostensibly, Dartt was terminated by Shell because a reorganization of the credit card department had left her without any work. Dartt, who was fifty-one years of age at the time of her termination, believed that her discharge was prompted because of her age and therefore contacted an attorney. She was told by this attorney that it was unnecessary to have an attorney and that she should instead contact the Federal Wage and Hour Division. Pursuant to this advice, on August 9, 1973, Dartt met with J. Dean Speer, the Assistant Area Director of the Department of Labor's Wage and Hour Division in Tulsa. Mr. Speer interviewed Dartt, filled out the Department's complaint form, and instructed Dartt that he would investigate. When asked how long the investigation would take, Speer responded that it might take a year.

Believing that he had a good working relationship with Shell, Speer called Shell immediately following Dartt's visit to his office in an attempt to conciliate Dartt's complaint. Speer met several times with Shell's manager of

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[1] Section 626(d) provides in part:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . . .

employee relations, but concluded that his conciliation efforts with Shell were unsuccessful and moved into what he termed "an investigative posture." At this time Shell agreed to make internal studies and to prepare statistical information on its hiring and promotion practices as requested by Speer in his investigation of Dartt's complaint.

Finally, after not having received the requested information from Shell, Speer notified Dartt by letter dated March 5, 1974, that there would be some delay in completing the investigation. In this letter Speer discussed her private right to sue, enclosed a pamphlet detailing the provisions of the ADEA, and directed Dartt's attention to the time limitations for filing one's own lawsuit. Dartt testified that the letter and pamphlet constituted her first actual notice of her right to bring a private action and the 180-day notice requirement. She immediately retained private counsel who on March 14, 1974, mailed a letter to the Tulsa office of the Department of Labor giving notice of Dartt's intention to file a private lawsuit against Shell for violation of the ADEA.

After receiving this notice, Speer attempted to "reconciliate" Dartt's complaint, again without success. Speer notified Dartt's attorney on May 16, 1974, that the Department's efforts had proved unsuccessful and that she was free to take whatever action she wished. The present lawsuit was filed as a class action on May 21, 1974.

Dartt advances essentially two arguments on appeal: (1) While admitting that filing a notice of intent to sue is a prerequisite of a private civil action under the ADEA, Dartt contends that the 180-day period for doing so is not jurisdictional in the sense that it can never be extended and asserts that this is a proper case for such extension; and (2) Even if the 180-day period is not subject to equitable modifications, Dartt's initial complaint to the Wage and

Hour Division was adequate to satisfy the requirement of filing a notice of intent to sue. Dartt's latter argument is supported by the Department of Labor in its *amicus curiae* brief.

At the start we reject Dartt's second argument. Section 626(d) specifically requires a "notice of an intent to file" a private civil action. To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act. Powell v. Southwestern Bell Telephone Co., 5 Cir., 494 F2 485, 489.

The remaining issue in this case is whether the filing of a notice of intent to sue within the 180-day period provided for in section 626(d)(1) is jurisdictional in the traditional sense that failure to comply is an absolute bar to bringing an action or whether the time limitation is more analogous to statutes of limitation and subject to equitable modifications. Admittedly, ample authority supports the trial court's conclusion that compliance with section 626(d)(1) is a "jurisdictional prerequisite" to any private action under the ADEA.[2] However, after examining the cases and the legislative history, we remain unconvinced that Congress intended the failure to file notice within the

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[2] Ott v. Midland-Ross Corp., 6 Cir., 523 F2 1367; Hiscott v. General Elec. Co., 6 Cir., 521 F2 632; Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F2 1195; Powell v. Southwestern Bell Tel. Co., 5 Cir., 494 F2 485; Raynor v. Great Atl. & Pac. Tea Co., E.D. Va., 400 F. Supp. 357; Vaughn v. Chrysler Corp., E.D. Mich., 382 F. Supp. 143; Oshiro v. Pan Am. World Airways, Inc., D. Hawaii, 378 F. Supp. 80; Cochran v. Ortho Pharmaceutical Co., E.D. La., 376 F. Supp. 302; Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617; Gebhard v. GAF Corp., D. D.C., 59 F.R.D. 504.

180-day notice period to be an absolute bar to bringing an ADEA private action.

Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, courts sometimes refer to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA. Moses v. Falstaff Brewing Corp., 8 Cir., 525 F2 92, 94; Curry v. Continental Airlines, 9 Cir., 513 F2 691, 693; Goger v. H. K. Porter Co., 3 Cir., 492 F2 13, 15. Title VII requires the complainant to file a charge of alleged unlawful employment practices with the Equal Employment Opportunities Commission (EEOC) within 180 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e). Faced with the issue of whether this Title VII time period was jurisdictional or more like a statute of limitations, the Fifth Circuit held:

> The *ratio decidendi*, however, of the leading cases dealing with timing requirements in general under the Act compels the conclusion that the ninety day requirement [amended in 1972 to 180 days] is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here.

Reeb v. Economic Opportunity Atlanta, Inc., 5 Cir., 516 F2 924, 928. *Reeb* is not alone in allowing equitable considerations to toll the time limitations established by Title VII. *See, e.g.*, Culpepper v. Reynolds Metals Co., 5 Cir., 421 F2 888, 891; Antonopulos v. Aerojet-General Corp., E. D. Cal., 295 F. Supp. 1390, 1395. The *Reeb* court's holding that the notice period was not jurisdictional in the strict sense was based on the arguments that: (1) Since the complainants under the Act would most likely be laymen, they should not be held to "the technical rules of common law pleading" in filing their charges; (2) Title VII was remedial legislation and therefore entitled to a liberal construction; and (3) Many of the cases calling the time limitation "jurisdictional" were suffering from a "conceptual confusion" since having labeled the requirement jurisdictional they proceeded to toll the time limitation for equitable reasons.

This court has also determined that under certain conditions the 180-day period for filing charges with the EEOC may be tolled. Sanchez v. Trans World Airlines, Inc., 10 Cir., 499 F2 1107, 1108. *See also* Archuleta v. Duffy's Inc., 10 Cir., 471 F2 33 & n.1 (where this court referred to the time limitation for filing a civil action after receiving a right-to-sue notice from the EEOC as a "statute of limitations").

Many of the arguments advanced for tolling Title VII time limitations are applicable to the time limitations in the ADEA. In a recent case discussing section 626(d)(1) time limitations, a court observed that the confusing use of the term "jurisdictional" in some Title VII cases was also occurring in ADEA cases: "Many courts have labeled the filing requirements 'jurisdictional' but have treated them as analogous to statutes of limitations and subject to equitable modifications." Skoglund v. Singer Co., D. N.H., 403 F. Supp. 797, 804. For example, a recent Fifth Circuit case held that section 626(d)(1) prerequisites were jurisdictional, but proceeded to outline several instances where the 180-day notice period might be tolled. Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F2 1195, 1198. In dictum, the court suggested that the period

might be tolled until an aggrieved employee obtained legal counsel or acquired an actual knowledge of his rights under the ADEA. The court concluded, however, that it need not determine whether tolling was allowable because the plaintiff in that case had failed "to file notice within 180 days of securing counsel or within 180 days of actual knowledge." *Id.* Thus, it appears that even though the Fifth Circuit was the first court of appeals to label section 626(d)(1) requirements as jurisdictional, *Powell, supra,* it has left the door open for possible equitable modification of the 180-day notice period. This conclusion is further supported by the Fifth Circuit's determination that the analogous time limitation in Title VII was not jurisdictional, but subject to modifications. *Reeb, supra.*

Other cases dealing with the ADEA time limitations have also confusingly used the label "jurisdictional" while allowing a liberal interpretation of ADEA requirements. *See, Moses, supra;* Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617. These conceptual difficulties appear to be caused by an overly broad usage of the term "jurisdictional."

Other arguments support a determination that section 626(d)(1)'s time limitation should be treated as analogous to a statute of limitations. The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment. *Moses, supra* at 93; *Skoglund, supra* at 801. Additionally, strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights. *Skoglund, supra* at 801; Woodford v. Kinney Shoe Corp., N.D. Ga., 369 F. Supp. 911, 915. *See also* Love v. Pullman Co., 404 U.S. 522, 527; *Reeb, supra* at 928.

We do not contend that a filing of a notice of intent to sue is not a condition precedent to an action under the

ADEA. However, the similarities between Title VII and the ADEA, the liberal reading of analogous time limitations in Title VII, the overly broad usage of the term "jurisdictional" by courts interpreting section 626(d) of the ADEA, the remedial nature of the legislation, and the lack of legal training and guidance for many of the ADEA complainants lead us to conclude that while section 626(d)(1)'s notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel.[3] *See Moses, supra; Skoglund, supra; Woodford, supra;* and Bishop v. Jelleff Associates, D. D.C., 398 F. Supp. 579.

Left for consideration is the determination of whether the circumstances surrounding Dartt's complaint contain equitable factors warranting a tolling of the 180-day notice period. Placing emphasis upon Dartt's presumptive knowledge of the law and constructive notice from Shell's posted notices, discussed *infra,* note 5, the trial court held that Dartt was entitled to no equitable relief by way of tolling. We do not agree. Initially, Mrs. Dartt consulted an attorney who told her to take her complaint to the Labor

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[3]This conclusion is not inapposite to our recent holding in Law v. United Air Lines, Inc., 10 Cir., 519 F2 170. In *Law,* we found that filing of the notice was a "precedent" to a private action. In support of said proposition, we stated that we were "in accord with *Powell.*" *Id.* at 171. Tolling was not an issue in *Law* since the notice was filed more than 5 years after the alleged discriminatory act. Also, as we noted in our discussion of *Edwards, supra,* the Fifth Circuit did not intend to "close the door" on possible equitable modifications of section 626(d)(1)'s time limitations by its *Powell* decision. The Fifth Circuit itself noted that it was partially rejecting the plaintiff's tolling theory because the plaintiff "was expressly alerted to the time limitations for possible action, both private and agency assisted." *Powell, supra* at 490. The court in Powell simply was not faced with a situation where the equities dictated a tolling. Neither were we in *Law.*

Department's local Wage and Hour Division office.[4] Dartt promptly did so and was told by Mr. Speer, Assistant Area Director, that it might take up to a year before the investigation was concluded. Anxious to check on the progress of her case, Mrs. Dartt testified that after her initial interview with Mr. Speer, she telephoned Speer at least once a month. It was not until after the 180-day period had run that Dartt was informed that in order to bring a private lawsuit against Shell she would have to file notice of intent to sue within 180 days of the alleged discriminatory act. Immediately Dartt retained another attorney who promptly filed the requisite notice of intent to sue, even though it was 36 days beyond the statutory time period.

An important factor in determining whether to exercise this court's equitable powers to toll section 626(d)(1)'s time limitation is whether to do so would be in keeping

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[4] Dartt testified that when she telephoned an attorney to discuss Shell's possible infringement of the ADEA, the attorney responded: "You don't need an attorney. You need to go to the Federal Wage and Hour Department." Had Dartt's contact been more than a preliminary approach as to possible consultation, we might possibly be led to the conclusion reached in *Edwards, supra,* where the court noted it would be:

> [A] singularly inappropriate situation for such a remedy, in view of the fact that Edwards consulted an attorney long before the 180 day period ran. In such a circumstance, he had the "means of knowledge" of his ADEA rights, for the very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong. While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

Id. at 1200 n.8.

with the congressional purpose of the ADEA. The two basic purposes behind the 180-day notice requirement are: (1) To provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh, and (2) to give early notice to the employer of a possible lawsuit, the latter promoting both the preservation of evidence and good faith negotiating on the part of the employer during the conciliation period. *Moses, supra* at 94; *Powell, supra* at 488. From the record it appears that both of these purposes were fulfilled in spite of Dartt's tardy filing of the notice of intent to sue. Shell received early notification of Dartt's allegations; a Shell representative was contacted by telephone the same day that Dartt registered her allegations with the Labor Department. Also, the Labor Department attempted to conciliate Dartt's complaint following her initial complaint and well before receiving her notice of intent to sue.

There are other facts which tend to support an equitable extension of the 180-day notice period. For example, even though not required to do so by statute, it was the customary practice of Mr. Speer to advise every complainant of the 180-day notice of intent-to-sue requirement, which he did not do in this instance. Furthermore, Speer testified that he was awaiting certain statistical information which Shell had agreed to provide him before sending Mrs. Dartt the letter of March 5 which notified her of her right to bring a private suit under ADEA and the requirement of filing a notice of intent to sue within 180 days of the discriminatory act. In an indirect manner, therefore, Shell's failure to provide the agreed upon information to the Wage and Hour Division contributed to Speer's failure to notify Dartt of her right to sue prior to the running of the 180-day period. Finally, even though Congress inserted a requirement that employers must post

such information pertaining to the ADEA "as the Secretary [of Labor] deems appropriate to effectuate the purposes of [the Act]," 29 U.S.C. § 627, such notice posted by Shell, even though provided by the Wage and Hour Division, was completely inadequate to inform Dartt as to the 180-day notice requirement.[3]

We cannot fault Dartt in her efforts to present her cause. She twice promptly sought private legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause. This is not a case of a plaintiff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of Dartt's notice of intent to sue.

Reversed and remanded for further proceedings consistent with this decision.

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[3]The printed notice which was furnished to Shell by the Department of Labor noted that the ADEA was applicable to persons age 40 to 65, listed the employers who were subject to the Act, and stated:

> If you feel you have been discriminated against in matters of hiring, discharge, compensation, or other phases of employment because of your age, contact the:
>
> U.S. Department of Labor
> Wage and Hour Division

Without discussing whether the notice adequately complied with Congress' language that the notice set forth "information as the Secretary deems appropriate to effectuate the purposes of" the ADEA, 29 U.S.C. § 627, we could not in good conscience hold Dartt to strict compliance of the 180-day notice period by constructive notice of this posting.

JULY TERM — August 19, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

No. 75-1277

ANNE M. DARTT,
Plaintiff-Appellant,
vs.
SHELL OIL COMPANY,
Defendant-Appellee.
DEPARTMENT OF LABOR,
Amicus Curiae.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis, Senior Circuit Judge Breitenstein and Circuit Judge Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

By /s/ Linda A. Hall
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON JULY 22 and 24, 1974
and AUGUST 22, 1974
UNITED STATES COURTHOUSE
TULSA, OKLAHOMA

[PROCEEDINGS HAD ON JULY 22, 1974]

[20] * * *

THE COURT: * * * Now, I take it that the Defendant is taking the position that this alleged act of discrimination occurred on July 31, 1973, when the Plaintiff was terminated.

MS. MATTHIES: That's correct, Your Honor.

THE COURT: And that the only notice that you've received is the letter from Mr. Greer, the only notice —

[21] MS. MATTHIES: Of Intent to Sue, Your Honor.

THE COURT: — was the March 14, 1974 letter of Mr. Greer to the Department of Labor.

MS. MATTHIES: It was received some time shortly thereafter, but, yes, Your Honor.

THE COURT: Under date of March 14, 1974?

MS. MATTHIES: Yes.

THE COURT: Does the Plaintiff rely on any other notice besides the notice of this letter?

MR. GREER: No, Your Honor, it's all in. I mean, it's — she made the complaint, she never gave the Notice of Intent to Sue within the 180 days. We can't get around that.

THE COURT: I noticed that you make one comment in your letter. "As you know, Mrs. Dartt has previously filed a complaint with your office and I understand that you're in the process of making an investigation into the

complaint." What does this mean? This is in your letter.

MR. GREER: Yes. Well, when the client first came to me, of course, she had already filed a complaint. She never was in my hands at the time the original complaint was filed. It was just after she got in my hands that the Notice to Sue was given.

[22] THE COURT: You're not relying on this sentence, then, as being a notice under the 180 day Statute?

MR. GREER: Truthfully, I don't think we can qualify it as a Notice of Intent to Sue, as the cases have interpreted that.

THE COURT: All right. I just had a little question as to whether or not you were relying on some 180 day notice other than your letter of March 14, 1974, and you tell me that you're not.

MR. GREER: No.

THE COURT: That's correct?

MR. GREER: Yes, that's right.

* * *

[THE FOLLOWING PROCEEDINGS WERE HAD ON JULY 24, 1974:]

[24] * * *

THE COURT: All right. Now, as I understand, you wished, at the last hearing, to amend your complaint to allege the Defendant did not post notice as required by the Statute; is that right?

MR. GREER: Yes, sir.

THE COURT: All right. This amendment will be allowed. We will hear your evidence.

* * *

ANNE M. DARTT,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECTION EXAMINATION
BY MR. GREER:

* * *

[25] Q And when were you terminated?

A July 31, 1972 — 73, I'm sorry.

* * *

[26] * * *

Q Now, when you were terminated, you did make a complaint with the Wage and Hour Division?

A Yes, sir.

* * *

First of all, when did you make the complaint?

A It was on or about September 9th.

Q Following your dismissal?

A Yes, sir.

[27] Q All right. Did you receive any communication from the Wage and Hour Division then?

A Not until March 5, '74.

Q All right. Did you receive any information from them regarding time to file your complaint?

A No, sir, I did not. I was not aware until I received it in the mail on March 5th.

Q Did you then receive a letter and a booklet from the Wage and Hour Division, Department of Labor as you stated on March 5th?

A Yes, sir, I did.

Q Would you look at this, please. Can you tell us what that is.

A Well, this is the brochure that they sent me when they sent this letter telling me that they had — Had completed their investigation.

* * *

MR. GREER: Mark this, please. Would [28] you mark this, then, as Exhibit One and this as Exhibit Two.

If Your Honor please, we will offer Plaintiff's Exhibits One and Two.)

* * *

THE COURT: Any objections to Plaintiff's Exhibits One and Two?

* * *

THE COURT: All right. Plaintiff's Exhibits One and Two will be admitted in evidence for the purpose of this hearing.

Q (BY MR. GREER) Now, Mrs. Dartt, after making your complaint at the Wage and Hour Division, were you in contact with anyone at that office?

A Yes, sir. With Mr. Speer, by telephone only, from that time on.

Q Now, did you receive any literature, letter or information directing your attention to your requirement of giving Notice of Intent to Sue between the time that you first filed your complaint and the time you received [29] this letter of March 5th?

A No, sir. This is the first communication that I received from them. Anything — This is the first thing that I had that was written.

Q Did anyone at any time ever advise you of the notice?

A No, sir.

Q I mean of the requirement?

A No, sir.

* * *

CROSS EXAMINATION
BY MS. MATTHIES:

* * *

[31] * * *

Q You said after you were terminated, you filed a complaint some time in September of 1973; is that correct?

A Yes, ma'am.

Q How did you find out where it was that you were supposed to go and file the complaint?

[32] A I looked it up in the telephone directory.

Q Why did you know it was Wage and Hour rather than some other agency.?

A Well, Wage and Hour makes sense, where else would you go. I knew when I — I don't know whether I should discuss the other matters in the case or not, but I felt that the age was the factor and the reason that I was terminated and what I — that's what I was looking for.

Q Fine. And so how do you — I'd like you to go back in your memory and think how you came to believe that the Wage and Hour Division of the Department of Labor was the place where you were supposed to go. Did a friend ask you or tell you?

A No.

Q Did you go to an attorney and have him tell you?

A No, I — Yes. I phoned an attorney, I phoned an attorney looking for information and she stated to me at that time. "I don't believe you need an attorney, you need to go to the Federal Wage and Hour Department."

Q And so it is your testimony that —

A At this one.

Q — that you discovered from this unidentified [33] attorney to file your particular charge.

A yes.

Q How did you file that charge, did you go down to the Wage and Hour?

A I went to his office, yes, ma'am.

Q Did you file a written complaint at that time?

A I didn't write — I didn't sign anything. He took notes and called Shell Oil Company, in my presence while I was sitting there.

Q And who was this individual?

A Mr. J. D. Speer.

Q Mr. J. D. Speer.

A Un-huh.

Q At the time you were in that particular office during this visit, did he hand you any brochures on age discrimination, or anything of this nature?

A No, ma'am. He did not hand me anything.

Q Other than the particular facts surrounding your discharge, what, if anything, did he tell you concerning your right?

A He didn't advise me of any rights when I told him my story. He said, "Well, on the face of it, it appears that you do have a right to complain and [34] I'll investigate and I will let you know." And I said, "How long will this take?" And he said, "Oh, it may take a year." So I was quite surprised when I got the letter from him on March 5th, saying there was 180 day time limit.

Q You said after the period of time when you went down some time in September and filed your complaint, you testified, I believe, that you had several telephone conversations, did you not, with the —

A Yes, ma'am.

Q — Wage and Hour Division of the Department of Labor.

A Un-huh. Un-huh.

Q How many telephone conversations and when were they?

A I tried to call him at least once a month because I was anxious to know what was going on. He told me that they were still investigating and still working on it and he would let me know.

Q Were you aware at the time, Mrs. Dartt, that you could file a suit by yourself?

A No, ma'am.

Q You thought that the Department of Labor was the only —

A That's right. I thought that the Department [35] of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney.

Q So you talked to the Wage and Hour people several times?

A Yes, ma'am.

Q Once a month?

A At least once a month I spoke with Mr. Speers.

Q And during that entire period, it is your testimony that Mr. Speer never told you that you had a private right to sue?

A That's right.

Q Did anyone else ever tell you —

A No, ma'am.

Q — that you had private right to sue?

A No, ma'am.

Q When you received this letter on March 5, 1974, Plaintiff's Exhibit Number Two, what did you do then?

A Well, after I read the brochure referring to this time, I was quite shocked and at that time I retained Mr. Jefferson Greer to act in my behalf.

Q Did you have any communcations with the Department of Labor concerning that letter?

[36] A No, ma'am. Mr. Greer contacted them for me on this, the day after — the day I filed, he notified them of our intent.

Q The day you filed, I'm not sure I understand.

A I'm sorry, the day I contacted Mr. Greer and told him — gave him my story.

Q At that time you filed, then, your Notice of Intent to Sue?

A Yes, ma'am. Mr. Greer filed it in my behalf.

Q Did you read the copy of the Complaint in this case, the complaint which you filed in this case?

A I'm not sure I understand what you mean.

Q The initial papers that were filed in this case, have you ever read them?

A No, ma'am.

Q Did you ever receive a copy of the letter sent by Mr. Greer to the Department of Labor?

A No, I did not.

Q But it's your testimony that you believe that he sent the letter on the 5th of March?

A No, ma'am. This is the postmark date on my letter from the Department of Labor. It was a few days after that because I have a reply from the — a carbon [37] copy of their reply to Mr. Greer.

Q I'm afraid I don't understand. You're saying that you called him when you received the letter, the letter is dated March 5th, I believe, so —

A This letter —

Q Yes. Plaintiff's Exhibit Number Two.

A Yes. The postmark date on my envelope is March 5th, so probably didn't receive it until the 6th. I later contacted Mr. Greer; Mr. Greer says, "I'm afraid we've missed the time limit but we will file an see because you weren't aware of what was going on." And I — he handled the thing for me, sent the letter to the Wage and Hour Department, and I have a carbon copy of Mr. Speer's letter acknowledging receipt of Mr. Greer's letter. I think it's dated March 15th.

Q And it's your testimony that at the time you initially filed this complaint, you did believe that you were filing the complaint out of time?

A Yes, ma'am.

* * *

[42] * * *

THE COURT: Now, how old were you on the date of termination?

THE WITNESS: Fifty-one.

* * *

Did the Defendant give you any reason for your termination?

THE WITNESS: Yes, sir.

THE COURT: Was this in writing?

THE WITNESS: No, sir.

THE COURT: Who gave you the reason?

[43] THE WITNESS: The Credit Manager, Mr. Al Hogan.

THE COURT: What did he tell you?

THE WITNESS: He told me that he was very sorry but the — they had reorganized the Credit Department, all the positions were filled; therefore, they had nothing for me and therefore must terminate me.

THE COURT: Told you nothing about age having anything to do with it?

THE WITNESS: No, sir. I was told prior to that time by a Supervisor.

THE COURT: Who was this?

THE WITNESS: Mr. Lew Springer.

* * *

[44] * * *

THE WITNESS: He told, when I was placed on special assignment and I had a personnel review, a performance review, and during this review I said, "My project is not finished. When will I be coming back to the Credit Department?" He said, "You probably won't." I said, "Why?" He said, "Well, you have no potential because of your age."

Q When did he tell you this with reference to your termination?

THE WITNESS: This happened about a month before — before termination.

* * *

Then upon termination, you did have a reason to believe you were terminated because of your age?

THE WITNESS: Yes, sir, I did.

* * *

[46] * * *

Now, the first written correspondence you got from Mr. Speer was this letter of March 5, 74?

THE WITNESS: That's right.

* * *

THE COURT: Did you talk to him by telephone in the meantime?

THE WITNESS: Yes, sir.

THE COURT: What did you talk to him about, what did you tell him? What did you talk to him about?

[47] THE WITNESS: Well, on various occasions I would say, how are — "What's going on? How are we progressing? Is there still — Is there a chance that I can go back to work?"

THE COURT: You called about your complaint?

THE WITNESS: Yes, sir.

* * *

THE WITNESS: * * * Since he told me it might take a year for his investigation, I didn't worry about it. I didn't even try to find out anything else. The poster doesn't say anything about a time limitation.

THE COURT: But you didn't see the poster.

THE WITNESS: That's right. But it doesn't say it anyway. I did what the poster said to do, [48] go to the Federal Wage and Hour people, that's what I did.

THE COURT: Did you learn this information from the poster?

THE WITNESS: No, sir.

THE COURT: When did you learn this?

THE WITNESS: I called — I was a member of Iskanderi Club and we had an attorney in the Club and I called my friend and she said — she referred me to Stephanie C. Creemore, who is an attorney with Reinert, Duart and Stewart. She told me, she said, "You don't need an attorney. You need to go to the Federal Wage and Hour Department."

THE COURT: Well, then, you talked to some female lawyer and some male lawyer and then went to the Department, is that it?

THE WITNESS: When I was advised by the lady attorney that I needed to file with the Federal Wage and Hour people and not with an attorney at that time.

* * *

[49]

REDIRECT EXAMINATION

BY MR. GREER:

Q Mrs. Dartt, did you receive any additional wages at the time you were terminated?

A Yes, sir.

Q How much?

A Twenty-four weeks.

Q Was that in a lump sum?

A Yes, sir.

Q Did they deduct taxes, and so forth, from that?

A Yes, sir, they did.

Q That would have paid you up through what, December?

A Around December 31st.

* * *

RECROSS EXAMINATION

BY MS. MATTHIES:

* * *

[50] * * *

Q Weren't you interested as to what your rights were, Mrs. Dartt?

[51] A At that time I had complete faith in the Federal Wage and Hour Department to tell me what my rights were.

Q And you didn't ask what your rights were, then?

A No, ma'am. My right at that time, as far as I was concerned, was to be re-employed by Shell Oil Company, be completely reinstated, and that's what I was working for.

Q You didn't ask for the mechanics of how you do that?

A No, ma'am, I did not.

Q But you did go around looking for an attorney and you did go around looking for a place to file your charge when you first got started, didn't you?

A No, ma'am, I did not. I called a friend, who referred me to an attorney. I didn't go around looking for anybody.

Q But you were sufficiently interested in your rights at that point—

A That's right.

Q — that you found out where to go but once you ended up at the Wage and Hour Division of the Department of Labor, you all of a sudden were no longer interested in your rights?

[52] A I was interested in my rights but I had complete faith in the Federal Wage and Hour Department.

Q But you didn't ask any questions?

A No, ma'am. Not — what right would you have? I was trying to be re-employed.

* * *

[53] KENNETH E. JACOBS,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MS. MATTHIES:

* * *

[57] * * *

Q When did you first learn that Mrs. Dartt had filed a complaint against Shell Oil Company on the basis of age discrimination?

A August 10h of 1973.

Q You said August 10th rather than September?

A Yes.

Q All right. Who informed you of the fact that a complaint had been filed?

A Mr. Dean Speer of the Credit Card Center. I was not at the building that day but he talked with Mr. Frank Thompson, who was my Safety and Training Representative.

Q Did you subsequently talk to Mr. Speer concerning the charge filed by Mrs. Dartt?

[58] A Yes. He called me approximately one week later stating that Mrs. Dartt had talked to him and filed a charge, or a complaint, and he was calling to see if possibly I could arrange a schedule to get together with him and talk about the merits of the case. He specifically told me at that time that she had not —

* * *

Q Did you ever discuss with anyone at the Department of Labor whether or not — or whether, in fact, Mrs. Dartt had filed a Notice of Right to Sue against Shell Oil Company?

A This was brought out in our discussion with Mr. Speer.

Q In August of 1973, you discussed with the Wage and Hour representative whether Mrs. Dartt had filed a Notice of Right to Sue?

A Yes.

* * *

[62] * * *

JAMES D. DAVIS,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

[66] * * *

CROSS EXAMINATION

BY MR. GREER:

Q Mr. Davis, you say placing these posters [67] was part of your responsibility at least part of the time?

A Yes, sir.

Q When did you learn that a person had to file their Notice of Intent to Sue within 180 days?

A It would be —

Q Or did you ever learn it?

A No. I learned about it in this situation.

Q When this situation arose?

A Yes.

Q When Mrs. Dartt filed a complaint?

A Yes, sir.

Q Prior to that time, even though you were working and taking care of it, you didn't know it yourself?

A No, sir.

* * *

[72] * * *

MR. GREER: Well, Your Honor, I'll settle that; we want to be perfectly honest with the Court. [72] I don't think there is anything transpired in the correspondence with Mr. Speer that she ever says "We are going to sue." Her position is that she went to there and presented her complaint and put herself in their hands and from there on, she trusted them. She didn't know that the intent was required.

* * *

THE COURT: Is there any testimony before me that Plaintiff gave a Notice of Intention to Sue in verbal fashion to Mr. Speer?

MR. GREER: No, Your Honor. That's what we're stating; I just inquired of Plaintiff, there is no contention, she did not know it was required. She made her complaint, asked for relief, told them she wanted [74] her job back and that's it.

* * *

[83] * * *

THE COURT: All right, as I understand it, Mr. Greer, you're not contending that the Plaintiff gave to Mr. Speer, on her visit to his office, a verbal Notice of Intention to Sue.

[84] MR. GREER: That's correct.

THE COURT: And, of course, you are not contending, then, that she gave any written Notice of Intention to Sue.

MR. GREER: No, Your Honor.

THE COURT: I am correct, am I, basically you're saying that she placed herself in his hands and he let her rights slip by and that there should be some kind of a tolling and that this should apply to Shell.

MR. GREER: Yes. As we cite in our brief, this is a remedial statute. The Defendant has been prejudiced in no way, he actually and apprized of the circumstances and the claim and I think this is certainly a classic case for the application of the Court's equitable powers of tolling the Statute of Limitations.

* * *

[86] * * *

[THE FOLLOWING PROCEEDINGS WERE HAD ON AUGUST 22, 1974:]

* * *

[87] * * *

J. DEAN SPEER,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. GREER:

* * *

[88] * * *

Q Now, Mr. Speer, can you tell us, or tell the Court, whether you ever gave Mrs. Dartt information as to when she should file her Notice of Intent to Sue? Can you state that you did give her notice?

A Yes, I did give her notice.

Q When was that?

A The only notice of record is March 5, 1974.

Q All right. Did you ever give her oral notice in your conversation with her?

A I cannot recall. I do not remember giving Mrs. Dartt or not giving Mrs. Dartt orally.

* * *

[90] * * *

THE COURT: * * * Would you give us the date that Mrs. Dartt came to your office.

THE WITNESS: August 9, 1973.

THE COURT: One other question, if you don't mind. Is there a difference between filing, with your office, a complaint and giving your office a Notice of Intent to Sue?

THE WITNESS: Yes, sir, there is.

THE COURT: Would you explain the difference to me, please.

THE WITNESS: Well, the Act specifically instructs us that when we receive a Notice of Intent to Sue [91] we must notify two parties, the prospective parties to the lawsuit, and — of the impending lawsuit; and instructs us to attempt, by conciliation, conference or persuasion, to

element the prospective lawsuit by trying to reach some agreement that's amicable to the two parties.

THE COURT: This is when you receive a Notice of Intent to Sue?

THE WITNESS: Notice of Intent to Sue; yes, sir. And it gives us a minimum, or a maximum, whichever you want to look at it, of 60 days; the complainant must give us a minimum of 60 days in which to accomplish the conciliation. With the filing of a complaint, we are under no such restrictions from the time standpoint. We may either attempt to conciliate it. We may immediately go into what I would call an investigation posture, going in and looking at records, interviewing people, what you would normally consider an investigation to determine the facts. Or we may attempt conciliation first of all; and if that's the successful and we feel there is a possibility of a — of noncompliance with the Act, we may then get into an investigative posture and determine the facts and give the company a ruling and give them an opportunity to make the necessary change.

Of course, in the conciliation effort, if I may [92] use my own description, we try to avoid getting in a posture of finger pointing. At this time the Company may eliminate the practice or come to some conclusion without ever admitting any error with respect to the Act. When we get into an investigation posture, we do come to a conclusion and so advise the Company.

THE COURT: May the Department bring suit itself?

THE WITNESS: Yes, sir.

THE COURT: On a complaint?

THE WITNESS: Yes, sir.

THE COURT: And what's your time limit on that?

THE WITNESS: Two years or —

THE COURT: Two years.

THE WITNESS: Same under the Fair Labor Standards Act.

THE COURT: Two years, or three years or willfull?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q (BY MR. GREER) Mr. Speer, following the filing of a complaint, did you make an investigation, or attempt to make an investigation, of Shell Oil Company?

A I attempted to conciliate Mrs. Dartt's [93] complaint. The conciliation was unsuccessful. As a result, I asked Shell to provide me with some additional information. We were in that posture at the time the lawsuit was filed, or at the time we received the Notice of Intent to Sue. I then attempted to reconciliate, or get back into the conciliation procedure under our responsibilities when we receive Notice of Intent to Sue. That too proved unsuccessful. I advised you, as Counsel for Mrs. Dartt, that the conciliation was unsuccessful, that you had discharged your duties for the 60 days' notice and you could then pursue, if you wished, which you did.

Q Specifically, Mr. Speer, did you experience any delay in getting the information requested from Shell Oil Company?

* * *

A Well, it's a question of definition of delay. Shell agreed to make some internal studies, develop some statistical information that I requested in November of '73. At the time I received your Notice of Intent to Sue, and to this date, of course — Let me clarify that. At the time I received your Notice of Intent to Sue, I had not received that information with [94] respect to our current posture. I would have to say that I did advise Shell, at such time as you filed your lawsuit, that we were out, that we would not get involved in a conflict between the two parties. But at the time I received your Notice of Intent to Sue, and I advised Shell that I was backing out, I had not received the information that I had requested.

Q Were you awaiting this information before issuing the letter informing the complaintant of notice — of her requirement of the Intent to Sue?

* * *

THE WITNESS: Yes. I was awaiting the information at the time I wrote the letter to her.

[95] * * *

THE COURT: You asked Shell for some information —

THE WITNESS: Yes, sir.

THE COURT: — about this Plaintiff, Mrs. Dartt.

THE WITNESS: In regard to her complaint; yes, sir. Specifically, the information was with regard to practices, in general, with respect to promotions, hiring —

THE COURT: This was instigated because —

THE WITNESS: Yes, sir.

THE COURT: Because of the Plaintiff's complaint.

[96] THE WITNESS: That's correct.

THE COURT: And you sought this information?

THE WITNESS: Yes, sir.

THE COURT: You hadn't received it?

THE WITNESS: That's correct.

THE COURT: Now, I don't understand what you were going to do as far as the Plaintiff's complaint was concerned when you got this information.

THE WITNESS: Well, my intent was to make a determination of the facts, as my conciliation effort had been unsuccessful. I was then going to attempt to make a determination as to whether or not, in my opinion, she had suffered discrimination on the basis of age.

THE COURT: Well, if you should have decided, upon a receipt of this information, that she had been, what would you do?

THE WITNESS: I would have advised the Company

of that determination and given them an opportunity to make the necessary corrections.

THE COURT: Then what would you have done? Say the Company did nothing.

THE WITNESS: Well, I then would have to make a determination or evaluation of whether or not [97] I think the case is litigable, whether or not I think I've got a case, and submit it to attorneys.

THE COURT: For the Department of Labor to sue?

THE WITNESS: Yes, sir.

* * *

THE COURT: What would you have done, as far as the Plaintiff is concerned, with reference to her private lawsuit that she has under the law? She has a private lawsuit, doesn't she?

THE WITNESS: Yes, sir, she does.

[98] THE COURT: The Department has a lawsuit.

THE WITNESS: Yes, sir.

THE COURT: These are two different lawsuits.

THE WITNESS: Yes, sir.

THE COURT: When she came to you, you tell me she filed with you a complaint.

THE WITNESS: Yes, sir.

THE COURT: Did she file with you a Notice of Intent to Sue in her private capacity?

THE WITNESS: Not at that time, no, sir; she did subsequently.

THE COURT: Well, is that by letter from Counsel?

THE WITNESS: Yes, sir.

* * *

[99] * * *

Go ahead. Let me see if I understand. You say that before the Spring of '74, and this would have been when Mrs. Dartt came to you —

THE WITNESS: That's correct.

THE COURT: — that if one came in with a complaint, you orally advised the complainant of the requirements of the Act and they were given a pamphlet.

THE WITNESS: Yes, sir.

THE COURT: Now, I don't believe this is in evidence, is it?

MS. MATTHIES: Yes, Your Honor.

CLERK MILLER: It was a part of the letter.

THE COURT: Maybe we want to get it in evidence. Is this the pamphlet you would have given?

THE WITNESS: Yes, sir.

* * *

[100] * * *

THE COURT: What else would you do with a person who came in, like Mrs. Dartt, and gave you what you say was a complaint of age discrimination, firing complaint?

THE WITNESS: If the handling of the complaint went for an unduly long time, generally with respect to age discrimination, the complaints, we handle them; we start some type of handling immediately. Our experience is that, much as any other type of discrimination, memories begin to fail, this type of thing. We try to move on them as soon as possible, in addition to the fact that both parties could possibly be suffering damages as a result of any delay.

THE COURT: I understand that. But let's go back to the visit; here's a lady that comes in and says, "I was fired because of age."

THE WITNESS: Right.

THE COURT: And she raised a complaint [101] and you give her a pamphlet.

THE WITNESS: Yes, sir. And take the complaint.

THE COURT: You enter the conciliation phase.

THE WITNESS: Yes, sir.

THE COURT: I think the evidence before me indicates that you did call on Shell sometime in September, if I'm not mistaken. Mr. Ken Jacobs said that he first learned of the complaint on August 10th.

THE WITNESS: Yes, sir.

THE COURT: When you visited the Center and talked to his representative.

THE WITNESS: Yes, sir.

THE COURT: He testified that he later talked to you.

THE WITNESS: That's correct.

THE COURT: You called him about a week later, so apparently you got right on it and the following day went to the Center. Now, you were in the conciliation phase.

THE WITNESS: Yes, sir.

THE COURT: And you can't remember whether you told the Plaintiff anything about the Notice of Intent to Sue, verbally, and the 180 day limitation [102] or not, is that right?

THE WITNESS: No, sir, I cannot.

* * *

Q (BY MR. GREER) Mr. Speer, can you tell us whether the Department, at the time that Mrs. Dartt filed her complaint, operated under the assumption that this 180 day period in which they were required to file their Notice of Intent to Sue was jurisdictional or non-jurisdictional?

A Yes, sir, I can tell you.

Q What is your assumption?

A Our attorneys advised us that the — that the Department's position was that the 180 days was not jurisdictional.

* * *

[103] * * *

[103A] * * *

Q Mr. Spheer, when a complaintant comes to your office, do you attempt to discover if they are represented by Counsel or not?

A No. I can't specifically say that we do under the Age Discrimination Employment Act because, even if he is represented by Counsel, the law charges us with a responsibility of trying to eliminate any prospective lawsuit.

Q But, of course, if the Department Plans to file a lawsuit themselves, then you're under no limitation of Notice of Intent to Sue, is that correct?

A That's correct.

MR. GREER: I believe that's all.

THE COURT: He is under the two and three year limitation?

THE WITNESS: Yes, sir.

MR. GREER: Yes.

THE COURT: But the 180 days doesn't affect the Department?

THE WITNESS: No, sir.

* * *

[104] CROSS EXAMINATION

BY MS. MATTHIES:

Q Mr. Speer, I believe you testified that you had a procedure in effect in your office from 1971 until the Spring of 1974 regarding certain types of oral notice and handing of pamphlets and things of this nature. Who set up that procedure?

A I guess I would have to say that I did. I don't think there was a procedure when I came in '71.

Q As Assistant Area Director of the U.S. Department of Labor, is one of your duties setting up procedures such as this?

A Yes.

Q How, if at all, do you monitor or train em-

ployees, new employees coming in with respect to this specific procedure?

A Of course, everyone in the office that has involvement in this type of procedure is advised orally. But in this particular instance, with respect to age discrimination, the handling of this type of complaint, for some reason, has fallen to me. Either myself of the Area Director assigns all work in the Tulsa office and generally when an age discrimination complaint comes in, it always crosses my desk.

[105] Q How many age discrimination complaints per week would you say that you handle?

A When? Now?

Q Let's say in, oh, an average in the three month period, say, from July, August and September of 1973; what was the average per week?

A Per week?

Q Un-huh.

A I would say probably two a month.

Q Two a month.

A During that period of time.

Q Has that number increased since that period?

A Greatly, yes.

Q So it's your testimony, then, that you handle virtually all of the age discrimination complaints that come into the area office, is that correct?

A In initiating the set up of the investigation, yes. I don't personally go out on the investigation on all of them.

A But you do the initial phase?

A Yes.

Q In all of these cases, how many age complainsts would you say you've taken total since you have been in Tulsa, since 1971?

[106] A That would just be a wild guess.

Q One hundred, more than a hundred?

A I'm going to say between 75 and a hundred, somewhere in that neighborhood.

Q In all of those cases, can you recall of any instance where you have failed to give the Plaintiff, at some time during a 180 day period after the complaint is filed, a pamphlet or an oral discussion, or both, of their rights under the Act?

A I'd have to say I can't recall either way. No, I cannot recall a specific instance in which I did not. And if you were to ask me about a case I took in early 1973 or late 1972, I might not be able to remember having the particular discussion with that individual. It was the way that I handled them at that time.

Q In your own mind, Mr. Speer, do you think you advised Mrs. Dartt of her rights and gave her the Pamphlet?

* * *

[108] A I thought about this a great deal since the two opposing counsel have been in touch with me about it. I have to say again that I cannot specifically remember either advising Mrs. Dartt or giving her an pamphlet. If you are going to ask me in my own mind did I or didn't I, I would have to admit that I possibly blew it and did not.

Q And could you equally admit, then, to yourself that you possibly followed your — would you call this your standard procedure?

A Yes, Yes, I would have to admit that I may well have followed that procedure and advised her and gave her the pamphlet.

* * *

[109] * * *

Q Were there any factors about this case that would lead you to believe that you did not follow your standard procedure? Was there anything going on in the office as

that particular time, or anything else which would lead you to believe that you did not follow the procedure?

A Yes.

Q What?

[110] A My relationship with Shell and my belief that if there was a problem, if there was a problem, that it could be handled very expeditiously.

* * *

[111] * * *

Q Do you — I think I'd like to ask you once again, Mr. Speer, in your own mind, do you believe that you gave Mrs. Dartt the Notice or do you believe that you departed from your standard operating procedure?

* * *

A In my own mind, no, I do not believe that I advised Mrs. Dartt; and, yes, I do believe that I departed from my standard procedure.

Q Why?

A For the reasons I've already given you; [112] because of the unique relationship that I had with Shell and my feeling that — the only way I can describe it, without going into detail, there are extenuating circumstances — circumstances, if that's what you want to call them, with regard to the situation by Shell. And, again, admitting that in my — I searched for a proper word to describe my feeling at the time. I wanted to get right to it because I thought it would be resolved. As a matter of fact, I think I called Shell that very afternoon and set up the meeting the next day with Mr. Jacobs, a man in his personnel-employee relations department, thinking full well that it could be resolved very quickly.

* * *

[116] * * *

THE WITNESS: * * * I would have to refer to the unique relationship that I had with Shell.

THE COURT: What is this relationship? You said you had a relationship but you never told me whether it's good, bad or indifferent.

THE WITNESS: Well, I thought it was good.

THE COURT: Is that the kind of relationship you're talking about?

THE WITNESS: Yes, sir. May I describe the relationship, Your Honor?

THE COURT: Well, I think you've described it when you say it's good. I didn't know [117] what it was before but I assumed that it was good —

THE WITNESS: Yes, sir.

THE COURT: — and you thought you could work things out.

THE WITNESS: Yes, sir.

THE COURT: And you were going to sort of short circuit this particular problem because you thought you could work it out. I take it that's the reason you've given me for not using the employee interview form, the reason behind your opinion that you didn't give her this pamphlet, you didn't tell her that she had to file with you a Notice of Intent to Sue within 180 days of the alleged violation or she would lose her rights to a private lawsuit.

THE WITNESS: I did not consciously, assuming, again, that I did not give her a pamphlet or that I did not describe or explain to her her rights, I did not consciously make such a decision at the time she came into the office. What I'm saying is that after talking with her, I did not mull it over and come to the conclusion, while she was sitting there, there is no point in my advising her of her rights or giving her a pamphlet because I know Shell and we will get this resolved. I did not make that kind of decision. If anything, if that were the case, if, as a matter of fact, I did not [118] advise her, nor give her a pamphlet, it was pure oversight in my anxiety, is

really not the word either, I wanted to get on the case because I thought I could get it resolved very quickly. It had only been a matter of only a few days since Mrs. Dartt's termination and I felt if I could get it, and the quicker I got to it, we would get it resolved and the matter would be a very short-termed one. As it turned out, it wasn't. If, as an oversight, I made a very poor guess, and I don't know anything to do but to admit it.

THE COURT: Is it fair for me to assume that you just don't know, really whether you gave her a pamphlet and gave her oral notice about the 180 days or not?

THE WITNESS: It's fair for you to assume that I don't know, yes.

THE COURT: You just don't know one way or the other?

THE WITNESS: That's correct.

THE COURT: She's testified that you did not, do you know this?

THE WITNESS: Yes, sir, I'm aware of that.

THE COURT: Does this influence you in your testimony here?

THE WITNESS: No, sir, it doesn't.

[119] * * *

THE COURT: Did your office recieve a Notice of Intent to Sue by Mrs. Dartt prior to the March 14, 1974 letter from her attorney, Mr. Greer?

THE WITNESS: No, sir.

THE COURT: Was that the first Notice of Intent to Sue you received, the Department received?

THE WITNESS: Yes, sir. March 14, 1974.

THE COURT: Did you answer that letter?

THE WITNESS: Yes, sir.

* * *

[120] * * *

THE COURT: Tell us what you said to Mr. Greer.

THE WITNESS: I quote: "This will acknowledge receipt of your notice" — Let me preface, the date is March 15th, the next day. "This will acknowledge intent of your right to sue against Shell Oil, Tulsa, Oklahoma, on behalf of Mrs. Anne Dartt, Tulsa, Oklahoma, to seek relief from an alleged discriminatory practice under the Age Discrimination and Employment Act of 1967. As you will note in the enclosed pamphlet, the law provides that after receiving a Notice of Intent to Sue, the Secretary of Labor is required to notify the prospective Defendant and try to eliminate any alleged unlawful practice by informal consultation, conference and persuasion. The alleged discriminatory practice is being investigated and we will be in touch with you and your client." And it's my signature over my title.

THE COURT: Then you more or less treated that as a valid Notice of Intent to Sue?

THE WITNESS: Yes, sir.

THE COURT: Even though you received it [121] beyond the 180 day's period?

THE WITNESS: Our instructions, Your Honor, are that we do not advise either party as to the jurisdictional question when we receive a Notice of Intent to Sue.

THE COURT: Now, if someone comes in, as Mrs. Dartt did, immediately after a termination and files a complaint, and you study it and decide there is nothing to it, and she gives you Notice of Intent to Sue, do you then reopen and go through this 60 day's conciliation?

THE WITNESS: Yes, sir, we do.

THE COURT: All over again?

THE WITNESS: Yes, sir, we do. Now, may I ask you a clarifying question? You say we take the complaint and we evaluate it and determine that there is no violation. If we made an inquiry with the company and made the determination, we do not reopen the procedure, we advise

them that we have already attempted to conciliate the matter and they have discharged their responsibility and they may go ahead and attempt to file the suit if they wish. If they've come in to file a complaint and we, in our initial discussion with them, can ascertain that the discharge, or whatever, the alleged discriminatory act was for some reason other than [122] age, we will so advise them and advise them we don't feel they have a case. Then they may file a Notice of Intent to Sue. And, yes, sir, at that point we will attempt to conciliate.

THE COURT: Have you ever completed your investigation in this case?

THE WITNESS: No, sir.

THE COURT: Is it still open?

THE WITNESS: Yes, sir.

THE COURT: You testified that at some point, on advice of the Department Counsel, you didn't consider the 180 day notice requirement to be jurisdictional.

THE WITNESS: Yes, sir.

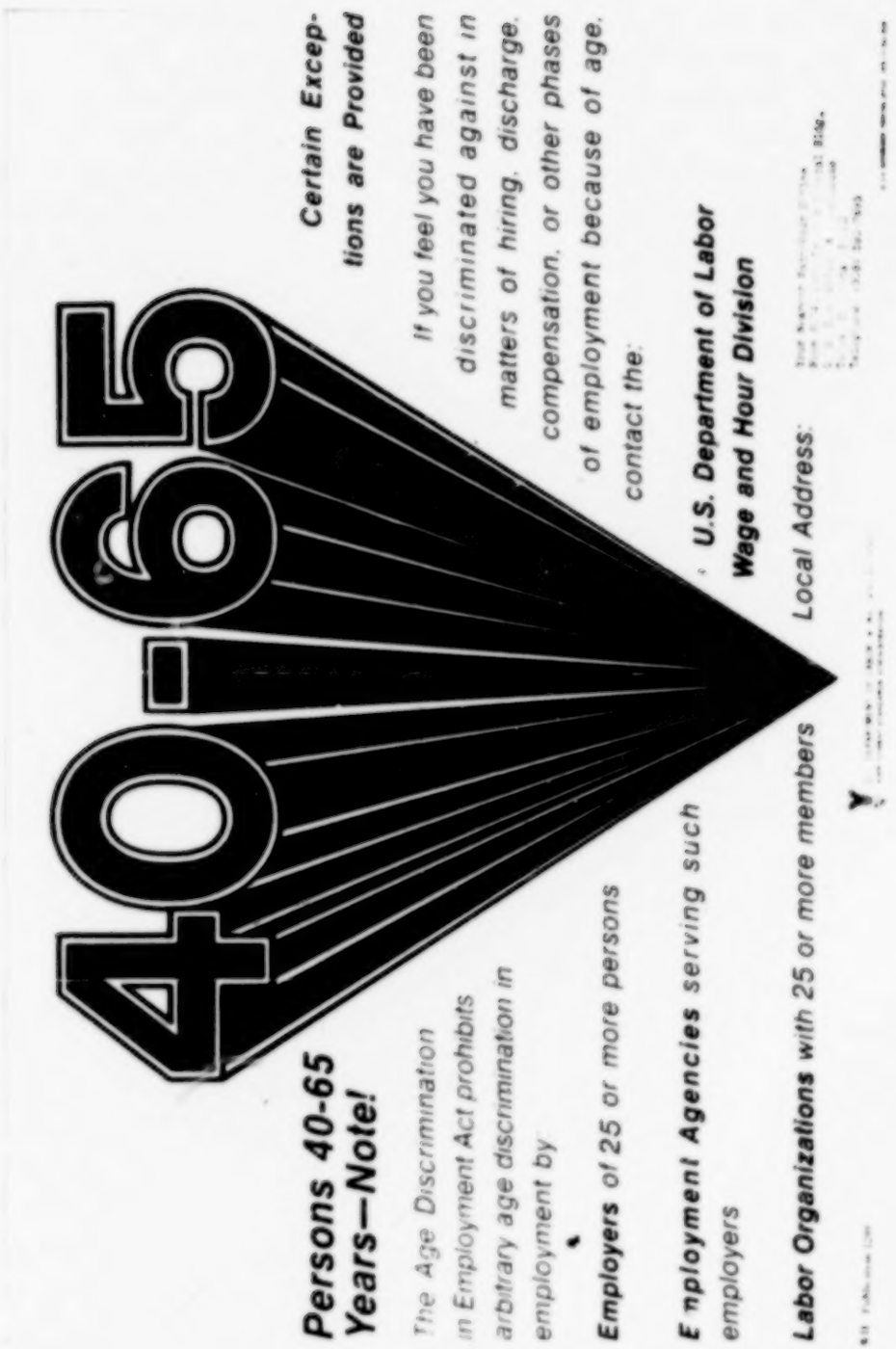
THE COURT: How do you consider it today?

THE WITNESS: The only answer I can give you, Your Honor, it's still in the book, the 180 days is not jurisdictional.

THE COURT: Not jurisdictional?

THE WITNESS: I understand there are decisions, I don't know if there is one in the Tenth Circuit, there is not to my knowledge, I understand there is one elsewhere, I believe in the Fifth Circuit, that the 180 days is jurisdictional but the — our procedural instructions [123] still contain the note that it is the Department of Labor's decision that it is not jurisdictional.

* * *


40-65
Persons 40-65 Years—Note!
The Age Discrimination in Employment Act prohibits arbitrary age discrimination in employment by
Employers of 25 or more persons
Employment Agencies serving such employers
Labor Organizations with 25 or more members
Certain Exceptions are Provided
If you feel you have been discriminated against in matters of hiring, discharge, compensation, or other phases of employment because of age, contact the:
U.S. Department of Labor
Wage and Hour Division
Local Address:

PLAINTIFF'S EXHIBIT 1

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 3014 Page Belcher Federal Building —
333 West Fourth
Telephone: 918/581-7695 Tulsa, Oklahoma 74103

DATE: March 5, 1974
REPLY TO
ATTN OF: JDS:db

SUBJECT: ADEA Complaint

TO: Ms. Anne Dartt
8716 E. 30th Street
Tulsa, Oklahoma 74129

As a result of the information you submitted, an investigation of Shell Oil Company, Tulsa, Oklahoma, has been scheduled. I regret that circumstances are such that there will be a delay in completing this investigation.

In view of this delay and to avoid any misunderstanding, your attention is again called to page 4 of the enclosed pamphlet. As you will note, there are certain requirements with specific time limits governing the circumstances under which an employee may file his own suit. The fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit. We do not, of course, encourage or discourage such suits. This is entirely up to you.

/s/ J. Dean Speer
J. Dean Speer
Assistant Area Director

Enclosure:
Pub. #1230

PLAINTIFF'S EXHIBIT 2

AGE DISCRIMINATION IN EMPLOYMENT ACT

U.S. DEPARTMENT OF LABOR
Workplace Standards Administration
WAGE & HOUR DIVISION

Your Nearest Wage-Hour Office
Room 3014, Federal Building
U. S. Post Office & Courthouse
Tulsa, Oklahoma 74103
Telephone: (918) 581-7695

[PLAINTIFF'S EXHIBIT 2 (Cont.)]

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

(Public Law 90-202, 81 Statute 602)

The Age Discrimination in Employment Act promotes the employment of the older worker based on ability rather than age; prohibits arbitrary age discrimination in employment; and helps employers and employees find ways to meet problems arising from the impact of age on employment.

The Secretary of Labor is responsible for administering and enforcing the Act. In addition, the Secretary will provide a program of education and information concerning the needs and abilities of older workers and their potential for continued employment and contribution to the economy. This program will include the publication of the results of studies and encourage the expansion of opportunities and advancement of older persons through public and private agencies. The Secretary will sponsor and assist State and community information and education efforts.

The Law

Protects individuals 40 to 65 years old from age discrimination by:

- *Employers** of 25 or more persons in an industry affecting interstate commerce
- *Employment agencies* serving such employers
- *Labor organizations* with 25 or more members in an industry affecting interstate commerce

It Is Against The Law

For an *employer*:

- to fail or refuse to hire, or to discharge, or otherwise discriminate against any individual as to compensation, terms, conditions, or privileges of employment, because of age;

* The term employer does not include the United States, a corporation wholly owned by the Government of the United States, or a State or a political subdivision thereof.

[PLAINTIFF'S EXHIBIT 2 (Cont.)]

- to limit, segregate, or classify his employees so as to deprive any individual of employment opportunities, or adversely affect his status as an employee, because of age;
- to reduce the wage rate of any employee in order to comply with the Act.

For an *employment agency*:

- to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of age, or to classify or refer anyone for employment on the basis of age.

For a *labor organization*:

- to discriminate against anyone because of age by excluding or expelling any individual from membership, or by limiting, segregating, or classifying its membership on the basis of age, or by other means;
- to fail or refuse to refer anyone for employment so as to result in a deprivation or limitation of employment opportunities or otherwise adversely affect the individual's status as an employee because of age;
- to cause or attempt to cause an employer to discriminate against any individual because of age.

For *employers, employment agencies, or labor organizations*:

- to discriminate against a person for opposing a practice made unlawful by the Act, or for making a charge, assisting, or participating in any investigation, proceeding, or litigation under it;
- to use printed or published notices or advertisements indicating any preference, limitation, specification, or discrimination, based on age.

Exceptions

The prohibitions against discrimination because of age do not apply:

- where age is a bona fide occupational qualification reasonably necessary to the normal operations of the particular business;
- where the differentiation is based on reasonable factors other than age;
- where the differentiation is caused by observing the terms of a bona fide seniority system or any bona fide employee benefit plan. This applies to new and existing employee benefit plans, and to the establishment and maintenance of such plans. *However, no employee benefit plan shall excuse the failure to hire any individual.*
- where the discharge or discipline of an individual is for good cause.

Record Keeping And Posting Requirements

Employers, employment agencies, and labor organizations must post an officially approved notice in a prominent place where employees may see it, and maintain the records required by the Secretary of Labor.

Enforcement

The Act is enforced by the Secretary of Labor, who can make investigations, issue rules and regulations for administration of the law, and enforce its provisions by legal proceedings when voluntary compliance cannot be obtained.

Enforcement provisions are similar in nature and closely related to those of the Fair Labor Standards Act. Amounts owing to any person as a result of a violation are to be treated as unpaid compensation under the provisions of

the Fair Labor Standards Act which authorize enforcement through civil actions in the courts.

The Secretary or any aggrieved person may bring suit under the Act. Suits to enforce the Act must be brought within 2 years after the violation, or in the case of a willful violation, within 3 years.

Before the Secretary begins court action, the Act requires him to attempt to secure voluntary compliance by informal conciliation, conference, and persuasion. Before an individual brings court action, he must give the Secretary not less than 60 days' notice of his intention.

This notice must be filed within 180 days of the occurrence of the alleged unlawful practice except, when a State has taken action in accordance with its own laws prohibiting age discrimination, then an individual must file within 300 days of the alleged violation. The law provides that after receiving such a notice, the Secretary will notify the prospective defendants and try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion.

Following are methods to recover amounts owed which result from violations of this Act:

1. The Secretary is authorized to supervise the payment of amounts owed;
2. In certain circumstances, the Secretary may bring suit upon written request of the individual;
3. An individual may sue for payment, plus attorney's fees and court costs. In the case of willful violations, an additional amount up to the total of the amount owed, may be claimed as liquidated damages. (An employee may not bring suit if he has been paid the amount owed under the supervision of the Secretary, or if the Secretary has filed suit to enjoin the employer from retaining the amount due the employee.)

4. The Secretary may obtain a court injunction to restrain any person from violating the law, including the unlawful withholding of proper compensation.

The courts, in enforcement actions, are authorized to grant any relief appropriate to carry out the Act's purposes, including among other things judgments compelling employment, reinstatement, or promotion.

Interference with representatives of the Secretary of Labor engaged in duties under the Act are subject to provisions of Sec. 1114 of the Criminal Code (Title 18, U.S. Code).

Additional Information

Inquiries about the Age Discrimination in Employment Act will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing. These offices also supply publications free of charge.

(971 WHD Publication 1210 Washington, D.C. 20210

[illegible] GOVERNMENT PRINTING OFFICE [illegible]

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. [illegible] - Price 10 cents

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1277

ANNE M. DARTT,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

AFFIDAVIT

WARREN D. LANDIS, being first duly sworn, states that:

(1) He is the Acting Administrator of the Wage and Hour Division, United States Department of Labor.

(2) By Secretary's Orders 14-71 and 15-71 (36 F.R. 8753, 8756 (May 12, 1971)), concerning the administration of the Age Discrimination in Employment Act of 1967 (Public Law 90-202, 81 Stat. 602, as amended, 29 U.S.C. §621 *et seq.*; hereinafter, the Act), he has been delegated authority and assigned responsibility for making investigations, effecting voluntary compliance and attempting to eliminate discriminatory practices through informal methods of conciliation, conference and persuasion.

(3) The powers thus delegated in accordance with Section 6(a) of the Act are derived from Section 7(a), (b) and (d) of the Act and Sections 9 and 11 of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, as amended, 29 U.S.C. §201 *et seq.*).

(4) As custodian of all compliance files maintained pursuant to the Act, he is in possession of and has examined a file concerning the age discrimination in employment allegations of Mrs. Anne M. Dartt of Tulsa, Oklahoma, against the Shell Oil Company, Credit Card Center, Tulsa,

Oklahoma, which discharged her from its employ on July 31, 1973.

(5) According to information contained in the compliance file, on August 9, 1973, Mrs. Dartt made an oral complaint of age discrimination against her former employer, the Shell Oil Company, to J. Dean Speer, Assistant Area Director, Wage and Hour Division, United States Department of Labor, Tulsa, Oklahoma.

(6) Shortly thereafter, Mr. Speer contacted by telephone and in person K. E. (Ken) Jacobs, Manager for Employee Relations, Shell Oil Company, Credit Card Center, Tulsa, Oklahoma, and informed him of Mrs. Dartt's age discrimination complaint.

(7) By letter dated September 4, 1973, and attachments thereto, Mr. Jacobs provided Mr. Speer with requested materials concerning the employment of Mrs. Dartt and all other employees classified as Senior Credit Analyst as of the date of Mrs. Dartt's discharge.

(8) On October 31, 1973, a compliance conference was held between Mr. Speer and Messrs. Jacobs and James (Jim) Norton of the Shell Oil Company, concerning Mrs. Dartt's allegation of age discrimination and the possibilities for settlement of her complaint.

(9) On November 27, 1973, Mr. Jacobs wrote to Mr. Speer, again asserting that age had not been a factor in the decision to terminate Mrs. Dartt, but agreeing that further discussions would be held with regard to the matter upon completion of "an internal review of [Shell's] employment, transfer, promotion, and performance appraisal policies and practices."

(10) In the period prior to December 1, 1973, on at least two occasions Mrs. Dartt spoke with Mr. Speer

by telephone concerning the status of her age discrimination complaint.

(11) In December 1973 and on January 21 and March 1, 1974, Mrs. Dartt telephoned the Wage-Hour Office in Tulsa, Oklahoma, to inquire about the status of her age discrimination complaint.

(12) By letter dated March 5, 1974, Mr. Speer informed Mrs. Dartt that "there will be a delay in completing this investigation" and notified her of private rights to sue under the Act, enclosing an explanatory publication entitled "Age Discrimination in Employment Act."

(13) By letter dated March 14, 1974 (addressed to the "Department of Labor * * * Attention: Mr. J. Dean Speer"), Jefferson G. Greer of Tulsa, Oklahoma, an attorney representing Mrs. Dartt, gave notice of intent to sue the Shell Oil Company on behalf of Mrs. Dartt for violations of her rights under the Act.

(14) By letter dated March 15, 1974, Mr. Speer acknowledged Attorney Greer's notice of intent to sue on behalf of Mrs. Dartt and informed him of the Labor Department's procedures for attempting to conciliate and settle the grievance.

(15) By letter dated March 15, 1974, Mr. Speer informed Mr. Jacobs at the Shell Oil Company of the receipt of Mrs. Dartt's notice of intent to file suit and of the Labor Department's procedures for attempting to conciliate and settle the grievance.

(16) In April or May 1974, following conversations with Mrs. Dartt regarding terms of settlement agreeable to her, Mr. Speer met with Mr. Jacobs to discuss the possibility of mediating or settling Mrs. Dartt's age discrimination complaint against the Shell Oil Company.

(17) On May 14, 1974, Messrs. Speer and Jacobs talked by telephone once again concerning the possibility of settling Mrs. Dartt's claim.

(18) By letter dated May 16, 1974, Mr. Speer informed Attorney Greer that attempts to conciliate Mrs. Dartt's complaint had proved unsuccessful, that the Labor Department would take no further action with respect to the matter, and that he was free to take whatever action he thought advisable.

(19) By letter dated May 21, 1974, Attorney Greer renewed an earlier request that the Labor Department make available to Mrs. Dartt any and all information disclosed by the investigation and conciliation efforts, as permitted by law and specifically the Freedom of Information Act (Public Law 89-487, 80 Stat. 250, as amended, 5 U.S.C. §552.)

(20) By letter dated July 2, 1974, George T. Avery, Regional Solicitor, United States Department of Labor, Dallas, Texas, informed Attorney Greer that under exceptions to the Freedom of Information Act the Labor Department was precluded from disclosing any materials in the compliance file other than such materials as were provided by Mrs. Dartt herself.

(21) On July 24, 1974, Mary T. Matthies of Tulsa, Oklahoma, an attorney representing the Shell Oil Company, contacted William F. Hamilton, Area Director, Wage and Hour Division, United States Department of Labor, Tulsa, Oklahoma, with a request that Mr. Speer be permitted to testify at a hearing in a suit brought under the Act by Mrs. Dartt against the Shell Oil Company.

(22) On July 29, 1974, Attorney Matthies was contacted by telephone and informed that Mr. Speer would be given permission to testify on the limited question of whether

or not Mrs. Dartt had been notified of her rights under the Act, specifically with respect to the 180-day notice requirement contained in Section 7(d) (1).

(23) By subpoenas dated August 6 and 19, 1974, Mr. Speer was ordered to give testimony at a court hearing and bring with him "the Investigative file in the case of Anne M. Dartt v. Shell Oil Co."

(24) On August 22, 1974, Mr. Speer testified at a hearing in the case of Dartt v. Shell Oil Company (Civil Action File No. 74-C-221) in the United States District Court for the Northern District of Oklahoma in Tulsa.

/s/ Warren D. Landis
WARREN D. LANDIS
Acting Administrator
Wage and Hour Division

U.S. Department of Labor
Washington, D.C. 20210

/s/ Ayaho Lamuna
Notary Public

Subscribed and sworn to before me,
this 24th day of July 1975.
My Commission Expires July 31, 1979

STATE OF OKLAHOMA
COUNTY OF TULSA ss. **AFFIDAVIT**

I, KENNETH JACOBS, of lawful age, being first duly sworn upon oath, depose and say:

That I am the Manager of Employee Relations for the Shell Oil Company Credit Card Center, located at 6502 South Yale, Tulsa, Oklahoma.

During my employment in that capacity, I had occasion to participate in several discussions with J. Dean Speer, Assistant Area Director of the local Wage and Hour Division office, regarding the discharge of Anne M. Dartt.

My first meeting with Mr. Speer regarding the Dartt case was on August 24, 1973. According to Mr. Speer, the purpose of that meeting was to advise Shell Oil Company of the charge by Ms. Dartt and to attempt to discover what the facts were in the case. Mr. Speer told us briefly what Ms. Dartt's allegations were, and I, in turn, advised Mr. Speer that Shell's reason for Ms. Dartt's termination was her poor work performance.

Mr. Speer then asked for some data on performance appraisals for Ms. Dartt and other persons in her job classification, which I subsequently mailed to him on September 4, 1973. During our meeting, Mr. Speer never stated that he was "conciliating" the Dartt charge. Instead, he gave me every indication he was pursuing an ordinary investigation.

Our next meeting was on October 31, 1973. At that time, Mr. Speer informed me that he had conducted interviews with several employees in his investigation of the Dartt charge, and that he felt that he had, in essence, a *prima facie* case against Shell. He then proceeded to outline the various aspects which he believed would create a *prima facie* case in the Dartt charge. At that time, he

asked whether we wanted an opportunity to present evidence in support of our position that no discrimination had occurred, or whether we were interested in settlement. I informed him that I would have to get back to him later as to the position of Shell on either exploring settlement or proceeding with the investigation.

On November 27, 1973, I wrote to Mr. Speer and advised him that we would proceed to compile certain data which he had indicated he would need if we decided not to explore settlement. The studies which Mr. Speer had requested were quite voluminous, and Mr. Speer was aware that it would take several months to complete the compilation of the requested data.

On February 25, 1974, I talked with Mr. Speer and advised him that we were making progress on the compilations and would complete them as soon as possible. Then, on March 18, 1974, Shell received a copy of the Notice of Intent to Sue filed by Ms. Dartt. Shortly thereafter, I met with Mr. Speer, who advised me that he no longer needed the compilations, inasmuch as Ms. Dartt was pursuing a private cause of action. At this same meeting, Mr. Speer advised me that he was no longer acting as an investigator with respect to the charge, but was there solely as a "mediator." He stated that it made no difference to him as to who was right in the dispute, and that anything the parties could agree on was fine with him.

The attitude of Mr. Speer was wholly different in this meeting than in our meeting of October 31, 1973. In the October meeting, Speer had stated that any settlement of the case would need to be acceptable to the Department of Labor and to Ms. Dartt. In the meeting mentioned above, he appeared to be disinterested in how the case was settled. Furthermore, in the October, 1973 meeting, Mr. Speer merely offered Shell the opportunity to explore

settlement of the charge, whereas, in the last meeting, Speer appeared to be actively interested in bringing the parties together without any control by Speer over the terms of the settlement.

I requested that Mr. Speer determine what Ms. Dartt was interested in as a settlement of the case. Mr. Speer telephoned me the next day, April 5, 1974, to inform me of Ms. Dartt's initial demands. I told Mr. Speer that Shell would discuss her offer, and decide whether it would make a counteroffer. Mr. Speer actively encouraged me to consider her offer, and stated he would present any counteroffer to Ms.Dartt.

We later determined that, for a variety of reasons, conciliation should not proceed, and so informed Mr. Speer. Shortly thereafter, the lawsuit by Ms. Dartt was filed.

I have read the above and foregoing statement, consisting of four (4) pages, and it is true and correct to the best of my knowledge and belief.

/s/ Kenneth Jacobs
KENNETH JACOBS

Subscribed and sworn to before me this 28 day of August, 1975.

/s/ Lisa Farrimond
NOTARY PUBLIC

My commission expires:
June 17, 1978